Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 79-101)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds) Customs Form 7605

The following consolidated aircraft bond has been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: March 27, 1979.

Name of principal and surety	Date term commences	Date of approval	Filed with area director of Customs; amount
Trans World Airlines, Inc., 605 Third Ave., New York, NY; The North River Ins. Co. (PB 6/17/71) D 2/28/79 [1]	Mar. 1, 1979	Mar. 1, 1979	J.F.K. Airport; $300,000

[1] Surety is The Continental Ins. Co.

The foregoing principal has been designated as a carrier of bonded merchandise.

BON-3-01

DONALD W. LEWIS,
(For Leonard Lehman, Assistant
Commissioner, Regulations and Rulings).

(T.D. 79–102)

Bonds

Approval and discontinuance of bonds on Customs form 7587 for the control of instruments of international traffic of a kind specified in section 10.41a of the Customs Regulations

Bonds on Customs form 7587 for the control of instruments of international traffic of a kind specified in section 10.41a of the Customs Regulations have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of list.

Dated: March 27, 1979.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Allied Intercontinental Agency, Inc., 39 Broadway, New York, NY; Old Republic Ins. Co.	Feb. 26, 1979	Feb. 26, 1979	New York Seaport; $10,000
American Enka Co., a Div. of Akzona Inc., Enka, NC; Seaboard Surety Co. (PB 3/4/70) D 12/20/78 [1]	March 4, 1979	March 4, 1979	New York Seaport; $10,000
American Hoechst Corp., (A DE Corp.) & its w/o/s Hoechst-Roussel Pharmaceuticals Inc., Marbert Cosmetics Inc., Foster Grant Corp., Calbiochem-Behring Corp., EOCOM Corp. (DE Corps.) & its divisions: Agricultural, Animal, Health, Azoplate, Film & Converted Products, Hoechst Fibers Industries, Industrial Chemicals Div., Plastics Division, Petro Chemicals, Route 202–206, North Somerville, NJ; Old Republic Ins. Co. (PB 4/15/76) D 2/13/79[2]	Feb. 13, 1979	Feb. 14, 1979	New York Seaport; $25,000
Balta Bros. Co., Inc., 1355 E. Henrietta Rd., Rochester, NY; St. Paul Fire & Marine Ins. Co.	Oct. 4, 1978	Oct. 13, 1978	Buffalo, NY; $10,000
Bemo Shipping Co., Inc., One World Trade Center, New York, NY; Federal Ins. Co. D 2/7/79	Jan. 13, 1976	Jan. 13, 1976	New York Seaport; $10,000
Canadian Gulf Lines, Inc., 6150 Richmond Ave., Suite 102, Houston, TX; St. Paul Fire & Marine Ins. Co.	Feb. 8, 1979	Feb. 14, 1979	Houston, TX; $10,000
Contract Marine Carriers Inc., 1201 Corbin St., Port Elizabeth, NJ; American Motorists Ins. Co.	Feb. 2, 1979	Feb. 7, 1979	New York Seaport; $10,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Cosmos Shipping Co., Inc., 140 Cedar St., New York, NY; St. Paul Fire & Marine Ins. Co.	Jan. 19, 1979	Jan. 25, 1979	New York Seaport; $10,000
G. C. Crommett Inc., 111 Jersey Ave., W. Babalon, NY; Peerless Ins. Co. D 1/22/79	Jan. 29, 1976	Jan. 30, 1976	New York Seaport; $10,000
Export Pacific, Inc., 1942 East Eleventh St., Tacoma, WA; St. Paul Fire & Marine Ins. Co. D 1/22/79	Feb. 6, 1976	Feb. 12, 1976	Seattle, WA; $10,000
FMC Corp., 200 East Randolph Dr., Chicago, Ill; American Home Assurance Co. (PB 11/1/74) D 1/5/79 [3]	Dec. 1, 1978	Jan. 5, 1979	Portland, ME; $10,000
Imperial Chemical Industries LTD. T/A ICI Fibres, Imperial Chemical House, Millbank, London, SWi, England; Seaboard Surety Co.	Jan. 23, 1979	Feb. 20, 1979	Norfolk, VA; $10,000
Kulmbacker Import Co., Inc., 70-02 Cypress Hills Rd, Glendale, NY; Old Republic Ins. Co.	Feb. 13, 1979	Feb. 22, 1979	New York Seaport; $10,000
Leschaco Inc., 8552 Katy Freeway, Suite 223, Houston, TX; St. Paul Fire & Marine Ins. Co.	Jan. 8, 1979	Feb. 8, 1979	Houston, TX; $10,000
Meadows Wye & Co., Inc., 111 Broadway, New York, NY; Old Republic Ins. Co.	March 1, 1979	March 1, 1979	New York Seaport; $10,000
Paxport Mills Inc., 300 Middle Waterway, Tacoma, WA; Washington International Ins. Co.	Jan. 23, 1979	Jan. 31, 1979	Seattle, WA; $10,000
Puerto Rican Cement Co., Inc., G.P.O. Box 4487, San Juan, PR; Puerto Rican-American Ins. Co. (PB 9/27/76) D 11/20/78 [4]	Nov. 21, 1978	Jan, 22, 1979	San Juan, PR; $10,000
Rallod Transportation Co., Inc., 100 California St., Suite 800, San Francisco, CA; Old Republic Ins. Co.	Jan. 18, 1979	Jan. 18, 1979	San Francisco, CA; $10,000
Salmon Shipping Co., Ltd., 6300 Richmond Ave., Suite 202, Houston, TX; St. Paul Fire & Marine Ins. Co. D 2/12/79	Aug. 10, 1978	Aug. 18, 1978	Houston, TX; $10,000
Sea Islands Transport, Inc. (A US Virgin Islands Corp.) P.O. Box 7667, St. Thomas, Virgin Islands; U.S. Fidelity and Guaranty Co.	Jan. 1, 1979	Feb. 7, 1979	San Juan, PR; $10,000
Seatrain Lines Inc., and its subsidiaries Seatrain Intermodal Services Corp., Seatrain Pacific Services Inc., Port Seatrain, Weehawken, NJ; St. Paul Fire & Marine Ins. Co. (PB 4/21/72) D 2/7/79 [5]	Jan. 15, 1979	Feb. 8, 1979	New York Seaport; $10,000
Snia Viscosa Inc., 40 East 34th St., New York, NY; Washington International Ins. Co. (PB 1/28/74) D 1/28/79 [6]	Jan. 29, 1979	Jan. 30, 1979	New York Seaport; $10,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
United Cargo Corp., 50 Rockefeller Plaza, New York, NY; Old Republic Ins. Co. (PB 6/27/76) D 2/13/79 [7]	Feb. 1, 1979	Feb. 2, 1979	New York Seaport; $10,000

[1] Principal is American Enka Corp. (A DE Corp.) Surety is St. Paul Fire & Marine Ins. Co.
[2] Principal is American Hoechst Corp. and its w/o/s Hoechst-Roussel Pharmaceuticals Inc., Marbert Cosmetics Inc., and National Laboratories Corp. (ALL DE Corps.) and divisions of American Hoechst Corp., Azoplate, Film, and Hoechst Fibres Industries and Department of American Hoechst Corp., Behring Diagnostics Surety is Peerless Ins. Co.
[3] Principal is Marine Colloids, Inc. (A DE Corp.) Surety is The Hartford Accident & Idemnity Co.
[4] Surety is Peerless Ins. Co.
[5] Principal is Seatrain Lines, Inc. (A DE Corp.) and its w/o/s Seatrain Lines, Calif. (A CA Corp.)
[6] Surety is Federal Ins. Co.
[7] Surety is American Motorists Ins. Co.

BON-3-10

DONALD W. LEWIS,
(For Leonard Lehman, Assistant
Commissioner, Regulations and Rulings).

T.D. 79-103

Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 79-16 for the following countries. Therefore, as to etnries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Japan yen:

March 19, 1979	$0.004831
March 20, 1979	.004827
March 21, 1979	.004832
March 22, 1979	.004866
March 23, 1979	.004857

(LIQ-3-O:D:E)

Date: March 30, 1979.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

T.D. 79–104

Foreign Currencies—Daily Rates for Countries not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

People's Republic of China yuan:	
March 19, 1979 through March 23, 1979	$0.633874
Hong Kong dollar:	
March 19, 1979	$0.205444
March 20, 1979	.204583
March 21, 1979	.202737
March 22, 1979	.202716
March 23, 1979	.202634
Iran rial:	
March 19–20, 1979	$0.013075
March 21–22, 1979	.0130
March 23, 1979	.013075
Philippines peso:	
March 19, 1979 through March 23, 1979	$0.1365
Singapore dollar:	
March 19–20, 1979	$0.458190
March 21, 1979	.457980
March 22–23, 1979	.458716

Thailand baht (tical):	
March 19, 1979 through March 22, 1979	$0.0500
March 23, 1979	.0505

(LIQ-3-O:D:E)

Date: March 30, 1979.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

(T.D. 79-105)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds) Customs form 7605

The following consolidated aircraft bond has been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: March 30, 1979.

Name of principal and surety	Date term commences	Date of approval	Filed with area director of Customs; amount
Evergreen Helicopters, Inc.; Evergreen International Airlines, Inc.; Evergreen Air of Montana; Rotor Aids; Evergreen Helicopter of Alaska, Three Mile Lane, McMinnville, OR; Insurance Co. of North America	Feb. 28, 1979	Mar. 12, 1979	Portland, OR; $100,000

The foregoing principals have been designated as carriers of bonded merchandise.

BON-3-01

DONALD W. LEWIS,
(For Leonard Lehman, Assistant Commissioner, Regulations and Rulings).

(T.D. 79–106)

Countervailing Duties—Bicycle Tires and Tubes From the Republic of Korea

Notice of American manufacturer's desire to contest final countervailing duty determination

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of desire to contest final countervailing duty determination made by the Secretary of the Treasury under 19 U.S.C. 1303.

SUMMARY: This notice is to advise the public that the Secretary of the Treasury has received notification of an American manufacturer's desire to contest the negative countervailing duty determination with respect to Korean manufacturers/exporters of bicycle tires and tubes, other than Korea Inoue Kasei.

EFFECTIVE DATE: April 6, 1979.

FOR FURTHER INFORMATION CONTACT: R. Theodore Hume, Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; telephone, 202–566–5476.

SUPPLEMENTARY INFORMATION: On January 12, 1979, an affirmative "Final Countervailing Duty Determination" relating to bicycle tires and tubes from Korea was published in the Federal Register (44 F.R. 2570). It was announced that the Government of Korea has given benefits with respect to one manufacturer (Korea Inoue Kasei) which constitute bounties or grants. It was also announced in this notice that with the exception of Korea Inoue Kasei, "the other Korean manufacturers/exporters investigated received aggregate ad valorem benefits of no greater than 0.34 percent, which are considered de minimis," and that, therefore, no bounty or grant exists within the meaning of 19 U.S.C. 1303.

Notification was received by the Secretary of the Treasury on January 19, 1979, that the Carlisle Tire and Rubber Co. of Carlisle, Pa., an American manufacturer of the same class or kind of merchandise as that described in the above determination, desired to contest this determination with respect to bicycle tires and tubes produced by companies other than Korea Inoue Kasei, from the Republic of Korea.

In accordance with the provisions of section 516 of the Tariff Act of 1930, as amended by the Trade Act of 1974 (19 U.S.C. 1516), notice is hereby given that an American manufacturer has informed the Secretary that it desires to contest the determination relating to bi-

289–736—79——2

cycle tires and tubes from Korea, produced by companies other than Korea Inoue Kasei.

R. E. CHASEN,
Commissioner of Customs.

Approved: March 27, 1979.
ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

[Published in the Federal Register April 6, 1979 (FR 44 20841)]

(T.D. 79-107)

Oleoresins from India Final Countervailing Duty Determination

TITLE 19—CUSTOMS DUTIES
CHAPTER I—U.S. CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

PART 159—LIQUIDATION OF DUTIES

AGENCY: U.S. Customs Service, Treasury Department.

ACTION: Final countervailing duty determination.

SUMMARY: This notice is to advise the public that a countervailing duty investigation has resulted in a final determination that the Government of India has given benefits considered to be bounties or grants within the meaning of the countervailing duty law on the manufacture, production, or exportation of oleoresins. Because this merchandise is eligible for duty-free entry into the United States under the Generalized System of Preferences (GSP), the case is being referred to the U.S. International Trade Commission for an injury determination. Countervailing duties will be levied on shipments which are dutiable because they are not entered under GSP.

EFFECTIVE DATE: April 9, 1979.

FOR FURTHER INFORMATION CONTACT: Holly Kuga, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; telephone, 202-566-5492.

SUPPLEMENTARY INFORMATION: On November 28, 1978, a notice of "Preliminary Countervailing Duty Determination" was published in the Federal Register (43 F.R. 55513). That notice stated that it had been preliminarily determined that benefits had been bestowed by the Government of India to manufacturers and/or exporters of oleoresins which constituted bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) (referred to as the act).

For purposes of this notice, "oleoresins" means flavoring extracts, and fruit flavors, essences, esters, and oils, not containing alcohol, and not in ampules, capsules, tablets, or similar forms, classifiable under item No. 450.20 of the Tariff Schedules of the United States Annotated (TSUSA). An oleoresin is a thick, liquid extract of the flavor of a spice used primarily in the food industry as a seasoning.

The preliminary determination stated that the Indian import permits program did not constitute a bounty or grant within the meaning of section 303 of the act, but that benefits constituting a bounty or grant were conferred under the "export cash assistance program." The notice further stated that before making a final determination, consideration would be given to any relevant data, views, or arguments submitted in writing not later than December 28, 1978.

The preliminary determination stated that the question of whether import permits, granted to exporters of the subject merchandise for imported goods and valued at up to 2 percent of the f.o.b. value of the exports, constitute a bounty or grant depended upon the negotiability of the permits for value. It has been determined that the producers and exporters of oleoresins fully utilized their permits to obtain material not available in India. Notwithstanding their potential market value, the permits were not sold. Therefore, the issuance and use of import permits in this case is determined not to constitute a bounty or grant.

The "export cash assistance program" was preliminarily determined to constitute a bounty or grant. Respondents claim that the purpose of this program is solely to refund various indirect taxes, whose direct remission would not constitute a subsidy under settled U.S. law and international practice and to serve as compensation for extraordinary expenses incurred by the spice producers for locating in the State of Kerala, an industrially undeveloped area of India.

The nonexcessive rebate upon exportation of indirect taxes on inputs physically incorporated in the final product is, as claimed, not regarded a "bounty" or "grant" within the meaning of section 303 of the act. Exporters of the subject merchandise currently receive a rebate of 20 percent of the f.o.b. value of the exported product, which will be reduced to 12.5 percent as of April 1, 1979. It has been ascertained that 8.27 percent of the f.o.b. value of oleoresin black pepper (presented and, for present purposes accepted, as representative of all oleoresin exports from India) constitutes the rebate of indirect taxes on inputs physically incorporated in the final product. Accordingly, this portion of the rebate is not countervailable. The remainder of the payment, is considered to be a bounty or grant within the meaning of section 303 of the act.

Information was requested, but has not yet been received, to deter

mine if the tax incidence on oleoresin black pepper, is, in fact, representative of all oleoresin imports. As this product accounts for the bulk of India's exports of oleoresins to the United States, the figures presented for pepper have been accepted as representative of those applicable to imports of all oleoresins. However, the Treasury Department will continue to seek complete information on the other types of oleoresins and will, if necessary, adjust the rate of countervailing duties on the other oleoresins as such data becomes available.

The dislocation costs claimed as a result of locating in Kerala were not accepted in the preliminary determination as offsetting a share of the export rebate. Additional information was requested before the final determination was made to determine whether producers would have been unlikely to locate in Kerala but for the payment to offset such dislocation costs.

The information provided to the Treasury Department indicates that the producers of oleoresins located in Kerala several years ago in order to benefit from the proximity of the crops being processed. It was only subsequently that the Government of India provided funds ostensibly to cover "dislocation costs." This situation contrasts markedly form previous cases in which dislocation costs were allowed. In those cases, a specific regional development plan was in effect to encourage the location of production facilities in a specified area. Thus the benefits could be taken into account by producers before establishing their facilities in a less economically advantageous area. In the instant case, however, the Indian producers of oleoresins made a business decision, in the absence of any such benefits, to locate their operations in Kerala presumably because they believed there were advantages in doing so. Because the decision to locate in Kerala was made well before the Government of India provided funds to the firms, these payments do not constitute dislocation costs which can be used to offset a portion of the export rebate.

Finally, a request has been made that the value of the export rebate be reduced by the expenses incurred in obtaining the payment. Such expenses include the cost of preparing application documents, various related commissions, and bank charges. Furthermore, Indian exporters of oleoresins are obliged to wait for the beginning of a calendar quarter before the Government of India accepts claims for benefits, and then must wait an additional 15 days before actually receiving payment. Thus, a request has been made that the opportunity cost associated with the waiting period be deducted from the value of the export rebate.

Although such requests for offsets may be acceptable in other circumstances, they are not allowable in the instant case. The costs associated with the preparation of documents have not been properly

supported. The offset for opportunity cost is not being allowed because there is no evidence of the actual experience of companies waiting for their payments. Additionally, the time elapsed between application for and receipt of payment appears to be the consequence of normal and relatively brief administrative delay involved in processing an application. This is in contrast to the case of textiles from Colombia, 43 F.R. 53525 (1978), in which some similar opportunity costs were allowed. In that instance, there was an offset given for the 90-day minimum waiting period mandated by the Government of Colombia between the establishment of the rebate amount and its disbursement to exporters. No comparable evidence of government mandated delay in payment has been presented here.

After consideration of all information received subsequent to the preliminary determination, it is hereby determined that exports of oleoresins from India benefit from bounties or grants within the meaning of section 303 of the act. The bounties or grants are in the form of a portion of the export rebate received under the "export cash assistance program," as explained above. The net amount of such bounties or grants has been ascertained and determined to be 11.73 percent of the f.o.b. price for those goods exported from India to the United States before April 1, 1979, and 4.23 percent of the f.o.b. price for those goods exported from India to the United States on or after April 1, 1979.

The oleoresins subject to this determination are normally entered duty-free pursuant to the U.S. Generalized System of Preferences (GSP), authorized by title V of the Trade Act of 1974 (19 U.S.C. 2461–2465, 88 Stat. 2066–2071). However, there have been instances in the past, and there may be in the future, where shipments of oleoresins from India have not satisfied all of the conditions for duty-free entry pursuant to GSP, and therefore have been dutiable.

With regard to dutiable merchandise which is subject to this determination, notice is hereby given that effective on or after (date of publication), and until further notice, upon the entry, or withdrawal from warehouse, for consumption of such dutiable oleoresins, imported directly or indirectly from India which benefit from these bounties or grants, there shall be collected, in addition to any other duties estimated or determined to be due, countervailing duties in the amount ascertained in accordance with the above declaration. To the extent that it can be established to the satisfaction of the Commissioner of Customs that dutiable imports of oleoresins from India are benefiting from a bounty or grant smaller than the amount which otherwise would be applicable under the above declaration, the smaller amount so established shall be assessed and collected.

Any merchandise subject to the terms of this order shall be deemed

to have benefited from a bounty or grant if such bounty or grant has been or will be credited or bestowed, directly or indirectly, upon the manufacture, production, or exportation of oleoresins form India.

As stated above, imports of oleoresins from India subject to this determination normally enter the United States duty-free pursuant to the GSP. In accordance with section 303(a)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1303 (a)(2)), countervailing duties may not be imposed upon any article or merchandise which is free of duty in the absence of a determination by the International Trade Commission that an industry in the United States is being, or is likely to be, injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States.

Accordingly, the International Trade Commission is being advised of this determination, and effective on or after (date of publication) upon the entry, or withdrawal from warehouse, for consumption of the merchandise in question which is duty-free pursuant to the GSP, liquidation will be suspended until further order or publication of the determination of the Commission, whichever occurs first.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)) is amended by inserting under the column headed "Country", the name "India"; the words "Oleoresins", in the column headed "Commodity"; the number of this Treasury decision in the column headed "Treasury decision"; and the words "Bounty declared-rate" in the column headed "Action".

(R.S. 251, as amended, secs. 303, 624, 46 Stat. 687, as amended, 759 (19 U.S.C. 66, 1303, as amended, 1624)).

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department No. 190, revision 15, March 16, 1978, the provisions of Treasury Department Order No. 165, revised, November 2, 1954, and section 159.47 of the Customs Regulations (19 CFR 159.47), insofar as they pertain to the issuance of a countervailing duty determination by the Commissioner of Customs, are hereby waived.

April 3, 1979.

ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

[Published in the Federal Register April 9, 1979 (44 FR 21009)]

(T.D. 79–108)

Amending the Generalized System of Preferences

There is published below Executive Order 12124 which makes certain changes in General Headnote 3(c) of the Tariff Schedules of the United States (TSUS) relating to the Generalized System of Preferences (GSP) established by the Trade Act of 1974, and certain other

changes affecting commodity description breakouts in the TSUS. Annex I of the Executive order shows the changes in the tariff descriptions; Annex II shows changes in items designated with an "A" in the GSP column of the TSUS; annex III shows changes in the items designated with "A*" in the GSP column of the TSUS; and annex IV shows changes in subdivision (iii) of General Headnote 3(c) which lists the beneficiary developing countries excluded from a duty preference for items designated with an A*. Changes have also been made in the list of beneficiary developing countries in subdivision (i) of General Headnote 3(c).

Executive Order 12124 was published in the Federal Register on March 2, 1979 (43 F.R. 11729).

(R:CV:S JCH 055678)

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

Presidential Documents

EXECUTIVE ORDER 12124 OF FEBRUARY 28, 1979
AMENDING THE GENERALIZED SYSTEM OF PREFERENCES

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including Title V and Section 604 of the Trade Act of 1974 (88 Stat. 2066, 19 U.S.C. 2461 *et seq.;* 88 Stat. 2073, 19 U.S.C. 2483), and as President of the United States of America, in order to modify, as provided by Section 504(c) of the Trade Act of 1974 (88 Stat. 2070, 19 U.S.C. 2464(c)), the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries, and to adjust the original designation of eligible articles taking into account information and advice received in fulfillment of Sections 503(a) and 131-134 of the Trade Act of 1974 (88 Stat. 2069, 19 U.S.C. 2463(a); 88 Stat. 1994, 19 U.S.C. 2151–2154), it is hereby ordered as follows:

SECTION 1. In order to subdivide existing items for purposes of the Generalized System of Preferences (GSP), the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202) are modified as provided in Annex I, attached hereto and made a part hereof.

SECTION 2. Annex II of Executive Order No. 11888 of November 24, 1975, as amended, listing articles that are eligible for benefits of the GSP when imported from any designated beneficiary developing country, is further amended as provided in Annex II, attached hereto and made a part hereof.

SECTION 3. Annex III of Executive Order No. 11888, as amended, listing articles that are eligible for benefits of the GSP when imported

from all designated beneficiary countries except those specified in General Headnote 3(c)(iii) of the TSUS, is amended by substituting therefor the new Annex III, attached hereto and made a part hereof.

SECTION 4. General Headnote 3(c)(iii) of the TSUS, listing articles that are eligible for benefits of the GSP except when imported from the beneficiary countries listed opposite those articles, is amended by substituting therefor the new Annex IV, attached hereto and made a part hereof.

SECTION 5. General Headnote 3(c)(i) of the TSUS is modified—

(i) by adding, in alphabetical order, to the list of independent designated beneficiary developing countries for the purposes of the Generalized System of Preferences "Comoros", "Djibouti", and "Seychelles"; and by deleting from the list of non-independent designated beneficiary developing countries and territories "Comoro Islands", "French Territory of the Afars and Issas", and "Seychelles."

(ii) by deleting from the list of independent designated beneficiary developing countries "Central African Republic", "Congo (Brazzaville)", "Maldive Islands", and "Republic of China", and by substituting therefor, in alphabetical order, "Central African Empire", "Congo", "Maldives", and "Taiwan", respectively.

(iii) by deleting from the list of non-independent designated beneficiary developing countries "Falkland Islands (Malvinas) and Dependencies", "Pitcairn Island", and "Spanish Sahara", and by substituting therefor, in alphabetical order, "Falkland Islands (Islas Malvinas)", "Pitcairn Islands", and "Western Sahara", respectively.

(iv) by deleting from the list of non-independent designated beneficiary developing countries "Portuguese Timor."

SECTION 6. The amendments made by this Order shall be effective with respect to articles that are both: (1) imported on or after January 1, 1976, and (2) entered, or withdrawn from warehouse, for consumption on or after March 1, 1979.

SECTION 7. Effective March 1, 1980, Annex II to Executive Order 11888, as amended, is further amended by deleting item 652.97, TSUS.

THE WHITE HOUSE,
February 28, 1979.

JIMMY CARTER

ANNEX I.—GENERAL MODIFICATIONS OF THE TARIFF SCHEDULES OF THE UNITED STATES

NOTES

1. Bracketed matter is included to assist in the understanding of the ordered modifications.

2. The following items, with or without preceding superior descriptions, supersede matter now in the Tariff Schedules of the United States (TSUS). The items and superior descriptions are set forth in columnar form and material in such columns is inserted in the columns of the TSUS designated "Item", "Articles", "Rates of Duty 1", and "Rates of Duty 2", respectively.

Subject to the above notes the TSUS is modified as follows:

	1. Item 361.20 is superseded by:		
	[Floor coverings . . .:]		
	[Other:]		
"361.21	With over 50 percent by weight of the fibers, exclusive of any core, being jute	8% ad val	35% ad val.
361.22	Other	8% ad val	35% ad val."
	2. Item 386.08 is superseded by:		
	[Articles not specially provided for, of textile materials:]		
	[Lace or net articles . . .:]		
"386.06	Of wool	25% ad val	90% ad val.
	Other:		
386.07	Shoe uppers	25% ad val	90% ad val.
386.09	Other	25% ad val	90% ad val."
	3. Item 387.30 is superseded by:		
	[Articles not specially provided for, of textile materials:]		
	[Other articles, not ornamented:]		
	[Of vegetable fibers, except cotton:]		
	"Other:		
387.32	Of jute	6.5% ad val	40% ad val.
387.34	Other	6.5% ad val	40% ad val."
	4. Item 648.81 is superseded by:		
	[Pliers, nippers, and pincers . . .:]		
	[Pliers, nippers, and pincers . . .:]		
	"Slip-joint pliers:		
648.80	Not forged, valued not over $6 per dozen	20% ad val	60% ad val.
648.82	Other	20% ad val	60% ad val."
	5. Item 652.98 is superseded by:		
	[Hangars and other buildings, bridges, bridge sections . . .:]		
	"Other:		
652.97	Offshore oil and natural gas drilling and production platforms	9.5% ad val	45% ad val.
652.99	Other	9.5% ad val	45% ad val."
	6. Items 653.49 and 653.51 are superseded by:		
	[Stoves, central-heating furnaces . . .:]		
"653.48	[Stoves (except hibachis) wholly or almost wholly of cast-iron, and parts thereof wholly or almost wholly of cast-iron	6% ad val	45% ad val.
653.52	Other	6% ad val	45% ad val."
	7. Item 685.32 is superseded by:		
	[Radiotelegraphic and radiotelephonic . . .:]		
	"Record players, phonographs, record changers, turntables, and tone arms, and parts of the foregoing:		
685.34	Tone arms and parts thereof	5.5% ad val	35% ad val.
685.36	Other	5.5% ad val	35% ad val."

	8. Item 731.60 is superseded by:		
	"Equipment designed for sport fishing, fishing tackle, and parts of such equipment and tackle, all the foregoing not specially provided for:		
731.65	Artificial baits and flies	12.5% ad val	55% ad val.
731.70	Other	12.5% ad val	55% ad val."
	9. (a) Item 732.37 is superseded by:		
	[Parts of bicycles:]		
"732.38	Three speed hubs whether or not incorporating a coaster brake; caliper brakes; multiple free-wheel sprockets	15% ad val	30% ad val.
732.39	Other parts of bicycles	15% ad val	30% ad val."
	(b) Conforming change: Item 912.10 is modified by deleting "and 732.37" and substituting", 732.38, and 732.39" in lieu thereof.		
	10. Item 791.25 is superseded by:		
	[Leather cut or wholly or partly . . .:]		
	"Other:		
791.24	Uppers lasted or otherwise fabricated with midsoles or insoles	5% ad val	15% ad val.
791.26	Other	5% ad val	15% ad val."

ANNEX II

Annex II to Executive Order No. 11888, as amended by Executive Orders Nos. 11906, 11934, 11974, 12032, 12041, and 12104 and Proclamation Nos. 4561 and 4632 is amended—

(a) by deleting the following TSUS item numbers:

106.70	222.34	417.22	603.45	682.60	731.10
107.48	240.10	418.24	610.66	683.15	731.30
107.65	240.12	418.78	610.71	684.10	731.50
107.80	240.21	420.78	612.40	684.70	731.60
121.15	240.30	420.98	622.40	685.40	732.62
121.55	240.34	422.24	632.60	686.24	734.20
121.56	240.50	426.34	646.82	687.30	735.09
146.12	240.56	427.08	650.83	688.30	737.35
147.36	245.00	427.16	650.89	696.10	740.75
148.25	245.20	437.24	651.13	696.50	741.15
152.54	252.25	455.16	651.45	702.14	748.15
152.58	254.56	455.30	651.51	702.20	748.40
154.40	254.58	460.60	651.62	702.47	751.15
154.55	304.40	465.15	652.98	706.47	756.40
161.53	304.58	473.32	653.25	708.57	760.38
161.69	308.35	473.50	653.51	708.91	774.35
162.11	308.55	522.71	657.30	710.36	790.07
177.12	355.20	531.21	660.42	722.55	790.59
200.06	364.14	544.11	676.20	724.35	791.17
200.91	365.05	545.31	680.52	725.32	
220.50	408.40	546.21	680.54	726.90	

(b) by adding in numerical sequence, the following TSUS item numbers:

112.94	222.62	426.12	612.02	650.31	711.30
113.50	240.38	427.60	612.60	650.45	713.17
131.35	240.40	445.20	612.63	650.56	723.32
136.98	240.58	460.35	622.25	650.79	728.20
140.09	254.63	460.70	624.40	651.33	730.77
140.14	306.53	470.15	624.42	651.49	731.70
140.55	306.71	473.62	624.50	652.93	732.38
145.52	308.51	473.78	628.40	652.97	734.40
149.15	308.80	490.30	628.50	652.99	734.42
153.02	337.20	494.40	629.26	653.30	734.54
153.08	361.21	514.44	642.08	653.52	748.20
153.28	366.84	515.54	642.14	680.53	750.32
156.35	370.17	517.21	644.28	680.54	771.45
156.45	386.09	517.24	646.04	680.55	773.20
161.75	387.32	520.39	646.88	680.56	790.60
166.30	403.40	540.47	646.89	685.34	791.20
176.15	405.45	545.35	648.80	688.20	791.26
176.70	407.12	546.23	648.89	700.54	791.70
182.10	417.20	601.54	649.71	702.08	792.30
188.34	419.00	602.30	649.89	702.25	
204.40	420.02	603.50	650.15	702.40	
222.44	420.82	607.65	650.21	710.34	

ANNEX III

TSUS ITEM NUMBER

106.70	140.25	152.54	202.62	240.30	308.55
107.48	141.35	152.58	203.20	240.34	319.01
107.65	141.55	154.40	206.45	240.50	319.03
107.80	141.70	154.55	206.47	240.56	319.05
114.05	141.77	155.20	206.60	245.00	319.07
121.15	145.08	155.35	206.98	245.20	335.50
121.52	145.53	156.40	220.10	252.25	347.30
121.55	145.60	161.53	220.15	254.56	355.04
121.56	146.12	161.69	220.20	254.58	355.20
130.35	146.22	162.11	220.25	256.60	360.35
130.40	146.44	168.15	220.35	256.85	364.14
135.51	147.33	176.33	220.37	304.04	365.05
135.80	147.36	177.12	220.41	304.40	389.61
135.90	147.80	177.72	220.48	304.44	403.58
136.00	147.85	182.90	220.50	304.48	403.79
136.30	147.88	184.65	222.10	304.58	408.40
136.80	148.12	186.20	222.34	305.22	408.75
136.92	148.25	186.40	240.02	305.28	416.05
137.40	148.35	190.68	240.10	303.30	417.22
137.71	148.72	192.85	240.12	306.52	418.24
137.75	148.77	200.06	240.16	308.30	418.78
138.05	149.50	200.91	240.19	308.35	420.78
140.21	152.43	202.40	240.21	308.50	420.98

422.24	531.21	651.51	686.30	730.25	741.20
422.76	533.26	651.62	687.30	730.27	741.50
425.84	535.31	652.84	688.10	730.29	745.08
426.34	544.11	653.02	688.12	730.41	748.12
427.08	545.31	653.25	688.30	731.10	748.15
427.16	545.37	653.47	688.40	731.30	748.40
437.16	545.53	653.48	690.15	731.50	750.05
437.24	545.65	653.70	692.27	732.62	750.35
437.64	545.81	653.85	696.10	734.10	751.05
446.10	545.85	653.93	696.35	734.20	751.10
455.16	546.21	657.24	696.50	734.25	751.15
455.30	547.41	657.30	702.14	734.30	751.20
460.60	603.45	660.42	702.15	734.34	756.40
461.15	610.66	660.44	702.20	734.51	760.38
465.15	610.71	662.18	702.45	734.56	760.65
465.70	612.03	662.35	702.47	734.60	772.03
466.05	612.06	672.10	703.20	734.75	772.35
473.32	612.15	674.56	703.65	734.87	772.51
473.50	612.40	676.20	703.75	735.09	772.97
473.52	613.15	676.23	704.34	735.11	773.10
473.56	622.40	676.52	706.40	735.20	774.35
473.82	626.22	678.50	706.47	737.25	774.60
493.21	632.60	682.60	708.57	737.30	790.07
511.31	646.82	683.15	708.91	737.35	790.39
514.11	646.86	683.70	710.36	737.50	790.59
514.54	646.98	683.80	713.15	737.80	790.61
516.24	649.75	684.10	713.19	737.95	790.62
516.71	650.83	684.50	722.55	740.10	790.70
516.73	650.87	684.70	724.35	740.30	791.17
516.74	650.89	685.24	725.32	740.34	791.80
516.76	651.01	685.40	726.70	740.38	792.50
518.41	651.13	685.90	726.90	740.75	792.60
520.35	651.45	686.24	727.31	741.15	792.75
522.71					

ANNEX IV

"(iii) The following designated eligible articles provided for in TSUS item numbers preceded by the designation "A*", if imported from a beneficiary developing country set opposite the TSUS item numbers listed below, are not entitled to the duty-free treatment provided for in subdivision (c)(ii) of this headnote:

TSUS item No.	Country or territory	TSUS item No.	Countey or territory	TSUS item No.	Country or territory
106.70	Mexico	121.55	India	136.00	Dominican Republic
107.48	Argentina	121.56	Argentina	136.30	Mexico
107.65	Bangladesh	130.35	Argentina	136.80	Mexico
107.80	Argentina	130.40	Mexico	136.92	Israel
114.05	Republic of Korea	135.51	Mexico	137.40	Mexico
121.15	Mexico	135.80	Nicaragua	137.71	Mexico
121.52	India	135.90	Mexico	137.75	Costa Rica

TSUS item No.	Country or territory
138.05	Mexico
140.21	Mexico
140.25	Mexico
141.35	Turkey
141.55	Dominican Republic
141.70	Taiwan
141.77	Mexico
145.08	Philippine Republic
145.53	Turkey
145.60	Taiwan
146.12	Argentina
146.22	Turkey
146.44	Philippine Republic
147.33	Jamaica
147.36	Israel
147.80	Mexico
147.85	Brazil
147.88	Mexico
148.12	Mexico
148.25	Mexico
148.35	Mexico
148.72	Chile
148.77	Republic of Korea
149.50	Mexico
152.43	Dominican Republic
152.54	Brazil
152.58	India
154.40	Taiwan
154.55	Taiwan
155.20	Argentina Brazil Colombia Dominican Republic El Salvador Guatemala Guyana India Jamaica Nicaragua Panama Peru Philippine Republic Taiwan Thailand
155.35	Barbados
156.40	Brazil Ivory Coast
161.53	Egypt
161.69	Mexico
162.11	Syria
168.15	Trinidad
176.33	Malaysia
177.12	Panama
177.72	Cayman Islands
182.90	Panama
184.65	Taiwan
186.20	Brazil
186.40	Mexico
190.68	Mexico
192.85	Mexico
200.06	Hong Kong
200.91	Honduras
202.40	Philippine Republic
202.62	Mexico
203.20	Malaysia
206.45	Philippine Republic
206.47	Taiwan
206.60	Mexico
206.98	Taiwan
220.10	Portugal
220.15	Portugal
220.20	Portugal
220.25	Portugal
220.35	Portugal
220.37	Portugal
220.41	Portugal
220.48	Portugal
220.50	Portugal
222.10	Hong Kong
222.34	Philippine Republic
240.02	Philippine Republic
240.10	Nicaragua
240.12	Brazil
240.16	Taiwan
240.19	Taiwan
240.21	Mexico
240.30	Mexico
240.34	Taiwan
240.50	Taiwan
240.56	Honduras
245.00	Romania
245.20	Brazil
252.25	Argentina
254.56	Hong Kong
254.58	Hong Kong
256.60	Republic of Korea
256.85	Mexico
304.04	Philippine Republic
304.40	Thailand
304.44	Brazil
304.48	Kenya
304.58	India
305.22	India.
305.28	Thailand
305.30	Thailand
306.52	Peru
308.30	Brazil.
308.35	Hong Kong
308.50	Republic of Korea
308.55	Republic of Korea
319.01	India
319.03	India
319.05	India
319.07	India
335.50	India
347.30	India
355.04	Mexico
355.20	Taiwan
360.35	India
364.14	Haiti
365.05	Haiti
389.61	Hong Kong
403.58	Israel
403.79	Mexico
408.40	Mexico
408.75	Romania
416.05	Mexico
417.22	Mexico
418.24	India.
418.78	Mexico
420.78	Turkey
420.98	Brazil
422.24	Mexico
422.76	Mexico
425.84	Netherlands Antilles
425.34	Taiwan
427.08	Hong Kong
427.16	Argentina
437.16	India
437.24	Brazil
437.64	Brazil
446.10	Malaysia
455.16	Taiwan
455.30	Israel
460.60	India
461.15	Bermuda
465.15	Cayman Islands
465.70	Argentina
466.05	Jamaica
473.32	Cyprus
473.50	Mexico
473.52	Mexico
473.56	Mexico
473.82	Republic of Korea
493.21	Taiwan
511.31	Mexico
514.11	Dominican Republic
514.54	Mexico
516.24	India
516.71	India
516.73	India
516.74	India
516.76	India
518.41	Mexico
520.35	Thailand
522.71	Somalia
531.21	Mexico
533.26	Romania
535.31	Mexico
544.11	Romania
545.31	Taiwan
545.37	Taiwan
545.53	Mexico
545.65	Mexico
545.81	India
545.85	Taiwan
546.21	Taiwan
547.41	Hong Kong
603.45	Republic of Korea
610.66	Israel
610.71	Israel
612.03	Chile Peru
612.06	Chile Peru Zambia

TSUS item No.	Country or territory
612.15	Mexico
612.40	Cayman Islands
613.15	Mexico
622.40	Brazil
626.22	Peru
632.60	Peru
646.82	Taiwan
646.86	Hong Kong
646.98	Mexico
649.75	Taiwan
650.83	Hong Kong
650.87	Hong Kong
650.89	Hong Kong
651.01	Hong Kong
651.13	Hong Kong
651.45	Taiwan
651.51	Hong Kong
651.62	Peru
652.84	Mexico
653.02	Mexico
653.25	Peru
653.47	Republic of Korea Taiwan
653.48	Taiwan
653.70	Hong Kong
653.85	Taiwan
653.93	Taiwan
657.24	Taiwan
657.30	Taiwan
660.42	Brazil
660.44	Mexico
662.18	Republic of Korea
662.35	Mexico
672.10	Hong Kong
674.56	Mexico
676.20	Taiwan
676.23	Argentina
676.52	Hong Kong Mexico
678.50	Hong Kong Republic of Korea Taiwan
682.60	Mexico
683.15	Mexico
683.70	Hong Kong
683.80	Hong Kong
684.10	Taiwan
684.50	Hong Kong
684.70	Taiwan
685.24	Hong Kong Republic of Korea Singapore Taiwan
685.40	Republic of Korea
685.90	Mexico
686.24	El Salvador
686.30	Taiwan
687.30	Malaysia
688.10	Taiwan
688.12	Mexico
688.30	Republic of Korea
688.40	Hong Kong
690.15	Mexico
692.27	Mexico
696.10	Taiwan
696.35	Taiwan
696.50	Brazil
702.14	Republic of Korea
702.15	Taiwan
702.20	Republic of Korea
702.45	Mexico
702.47	Mexico
703.20	Portugal
703.65	Mexico
703.75	Mexico
704.34	Taiwan
706.40	Hong Kong
706.47	Taiwan
708.57	Republic of Korea
708.91	Republic of Korea
710.36	Republic of Korea
713.15	Mexico
713.19	Mexico
722.55	Hong Kong
724.35	Republic of Korea
725.32	Taiwan
726.70	Mexico
726.90	Mexico
727.31	Republic of Korea
730.25	Turkey
730.27	Philippine Republic
730.29	Brazil
730.41	Brazil
731.10	Taiwan
731.30	Taiwan
731.50	Taiwan
732.62	Taiwan
734.10	Taiwan
734.20	Hong Kong
734.25	Hong Kong
734.30	Hong Kong
734.34	Hong Kong
734.51	Taiwan
734.56	Haiti
734.60	Taiwan
734.75	Republic of Korea
734.87	Taiwan
735.09	Taiwan
735.11	Taiwan
735.20	Taiwan
737.25	Republic of Korea
737.30	Republic of Korea
737.35	Hong Kong
737.50	Hong Kong
737.80	Hong Kong
737.95	Hong Kong Taiwan
740.10	Hong Kong
740.30	Hong Kong
740.34	Hong Kong
740.38	Hong Kong
740.75	Republic of Korea
741.15	Taiwan
741.20	Hong Kong
741.50	Hong Kong
745.08	Hong Kong
748.12	Haiti
748.15	Taiwan
748.40	Republic of Korea
750.05	Hong Kong
750.35	Taiwan
751.05	Taiwan
751.10	India
751.15	Taiwan
751.20	Taiwan
756.40	Hong Kong
760.38	Mexico
760.65	Taiwan
772.03	Hong Kong
772.35	Taiwan
772.51	Republic of Korea
772.97	Hong Kong
773.10	Hong Kong
774.35	Taiwan
774.60	Hong Kong Taiwan
790.07	Hong Kong
790.39	Taiwan
790.59	Taiwan
790.61	Taiwan
790.62	Taiwan
790.70	Republic of Korea
791.17	Argentina
791.80	Taiwan
792.50	Philippine Republic
792.60	Hong Kong
792.75	Hong Kong"

Customs Service Decisions

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

Dated: April 2, 1979.

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

(C.S.D. 79–98)

Aircraft: Use in International Traffic; Helicopter Shipped Abroad To Service Offshore Drilling Operations

Date: May 23, 1978
File: BOR–7–R:CD:C
103291 JL

To: Regional Commissioner of Customs, New York, N.Y.

From: Director, Carriers, Drawback and Bonds Division.

Subject: Your request for internal advice dated January 12, 1978, file CON–3–0:C:0.

This case involved a helicopter of French manufacture, regularly imported and duty paid, which was shipped out of the United States as cargo aboard a vessel on April 6, 1977. The aircraft was unladen in England and flown to Ireland where it was used, under a net-lease agreement, to carry passengers and freight between that country and offshore drilling platforms for a period of approximately 60 days. The aircraft was returned to the United States on or about July 18, 1977. (X) customhouse broker attempted to enter the aircraft under item 801.00, TSUS, free of duty. The entry was rejected because the lessee was not a foreign manufacturer and (X) was not the original importer of the helicopter.

In October 1977, counsel for (X) appealed to the area director of Customs, New York Seaport, asking that a general declaration (Customs form 7507) as required by section 6.2(d)(3)(1) of the Customs Regulations be accepted nunc pro tunc, under the theory that the helicopter was being operated in international traffic at the time of its return to the United States.

It is your position that the helicopter was shipped out of the United States as an article of commerce, and for that reason could not be said to be operating in international traffic at the time of its departure.

Conferences with representatives of (X) have developed three pertinent facts not contained in counsel's brief. It appears that the aircraft was carrying equipment and tools for the use of the lessee on its offshore drilling platforms when it departed the United States. The helicopter was designed exclusively to operate in offshore drilling operations. Also, the offshore drilling platforms serviced by the aircraft while under lease in Ireland were located well beyond the Outer Continental Shelf of that country.

T.D. 69–141(3) holds in part as follows:

> Duty-free aircraft of foreign origin registered in the United States which leaves the United States in international traffic and is not then or later exported from the United States and imported into a foreign country prior to its return to the United States in international traffic will not be treated as an imported article when it so returns, irrespective of the fact that it has been used in foreign local traffic. Must comply with section 6.2(d)(3)(1), Customs Regulations * * *.

Because the helicopter in this case departed the United States carrying cargo under a net-lease, albeit not under its own power due to its limited operating range, we are of the opinion it departed in, and while in Ireland actually engaged in, international traffic carrying cargo for hire. Accordingly, you should cancel the claim for liquidated damages and accept a declaration under section 6.2(d)(3)(i) of the Customs Regulations.

Although we consider the above dispositive of the case, we would like to point out that under the facts presented, the aircraft was operating not in foreign local traffic, but as an instrument of international traffic between Ireland and points on the high seas. Therefore, even if the aircraft departed the United States as cargo on a vessel but not carrying cargo for hire, it still would be considered to have departed in international traffic inasmuch as it departed the United States for the purpose of and actually engaged in international traffic while abroad without diversion to local traffic and without being registered in Ireland.

(C.S.D. 79–99)

Classification: Child's Overalls With Patch Pockets; Ornamentation

Date: June 15, 1978
File: CLA–2:RCV:MC
059444 PR

This is in reply to your letter of May 2, 1978, on behalf of your

client (name), concerning the tariff status of a child's pair of overalls that is labeled to be a product of Hong Kong.

The submitted sample is made of woven denim fabric, is shaped in the fashion of the typical suspender-type overalls, and is labeled to be size 3T. It has three patch pockets with zipper closures, one located in the center of the bib area and the other two just below the waistband in the front. A strip of woven denim fabric, the visible portion of which is 1¼ inches wide, runs across the front of the garment in the waist area. Since the bib is stitched to the rest of the garment in such a fashion that there are protruding edges, approximately three-eights inch wide, on the outside of the garment which are covered by the overlaid strip of fabric, that strip is considered to serve a primarily functional purpose.

You ask us to take particular note of the patch pockets which you state are formed from inserts. All three patch pockets are virtually identical in size, shape, and construction. Each pocket consists of six pieces of fabric. Three of the pieces are woven denim fabric which match the fabric forming the body of the garment. The other three pieces are strips of woven twill fabric, approximately three-quarters inch in width, that are divided into thirds. The two outside thirds are red and the centers are white. The strips are arranged to resemble a Y with three pieces of denim joined together by the stitching that holds the strips to the denim pieces. In this manner, it is meant to appear that the strips are actually inserts, although having the outward appearance of overlays.

The Customs Service has continuously ruled that true inserts in a garment do not constitute ornamentation. However, where a fabric is stitched over another fabric and the underneath fabric is then cut, the overlaid fabric is not considered a true insert and may constitute ornamentation for tariff purposes. In this instance, an examination of the inside portion of the pockets clearly indicates that the strips forming the Y on the outside were stitched to a completed pocket and then the fabric underneath those strips was cut. Accordingly, since the strips forming the Y present a decorative appearance, those strips constitute ornamentation and the garment is classifiable under the provision for other infants' ornamented wearing apparel, of cotton, in item 382.00, TSUS, with duty at the column 1 rate of 35 percent ad valorem.

The merchandise described above may be subject to import restrictions (quotas) based on international textile trade agreements. If you desire further information in this regard, it is suggested that you write directly to our Duty Assessment Division, enclosing a copy of this letter and a sample of the merchandise with your inquiry.

289-736—79——4

(C.S.D. 79–100)

Classification: Heat Transfer Paper

Date: June 15, 1978
File: CLA-2:RCV:MC
059455 EA

In your letter of December 23, 1977, you requested the tariff classification of heat transfer paper from West Germany. In a reply of March 23, 1978 (letter ruling 059031), the Customs Service ruled that colored pigments which are imprinted on paper and transferable from that paper to a permanent surface are classifiable under the provision for decalcomanias in item 273.75, Tariff Schedules of the United States (TSUS).

Although it was stated that the article is not used in transferring designs to ceramic ware, we wish to call your attention to the fact that the TSUS provides for classification in items 273.65 and 273.70, TSUS, for all decalcomanias that are in ceramic colors. Since such classification is expressly and unambiguously provided for in the TSUS, the letter of March 23, 1978, would not alter such practice of classification in items 273.65 and 273.70, TSUS, even for decalcomanias in ceramic colors that are transferred to articles other than ceramic ware.

(C.S.D. 79–101)

Classification: Catalyst LD–265 (Aluminum Oxide Coated With Palladium Oxide)

Date: June 15, 1978
File: CLA-2:R:CV:MC
059473 H

Your letter of May 10, 1978, concerns the dutiable status of a catalyst from France.

Catalyst LD–265 is said to be used for the hydrotreatment of C_5 steam-cracking fractions by selective hydrogenation of acetylenics and diolefines. It is said to be comprised of high-purity aluminum oxide (99.7 percent by weight) coated with palladium oxide (0.3 percent by weight). It is your opinion that the product is a mixture of inorganic chemicals and should be classified in item 423.96, Tariff Schedules of the United States (TSUS).

It is understood that the palladium oxide is coated on the aluminum oxide. Therefore, it is not a simple mixture but is prepared according to a particular set of specifications. There is no indication that a ground mixture of palladium oxide and aluminum oxide would function satisfactorily as the described catalyst.

If the catalyst is in chief value of aluminum oxide, it is classifiable as an article of mineral substances, not specially provided for, in item 523.91, TSUS. If in chief value of the palladium oxide, the catalyst would be classifiable under the provision for other articles, not provided for elsewhere in the schedules, in item 799.00, TSUS. The rate of duty is 5 percent ad valorem.

(C.S.D. 79–102)

Classification: M-aminophenol (3-hydroxyaniline)

Date: July 7, 1978
File: CLA–2:R:CV:MC
059468 MG

This is in reply to your letter of May 15, 1978, concerning the tariff status of m-aminophenol (3-hydroxyaniline), a product of India.

M-aminophenol is classifiable under the provision for other cyclic organic chemical products having a benzenoid, quinoid, or modified benzenoid structure in item 403.60, Tariff Schedules of the United States (TSUS), and is dutiable at 1.7 cents per pound plus 12.5 percent ad valorem.

Articles classifiable in item 403.60, TSUS, have not been designated by the President to be eligible articles for purposes of the Generalized System of Preferences. Therefore, although the m-aminophenol is a product of India, a country designated as a beneficiary of the Generalized System of Preferences, it is not exempted from duty.

Benzenoid products which are competitive with similar products of U.S. origin are subject to ad valorem rates based upon the American selling price of the domestic product.

(C.S.D. 79–103)

Classification: Needlepunched Nonwoven Fabric of Polypropylene

Date: July 7, 1978
File: CLA–2:R:CV:MC
059507 JW

This is in reply to your letter of May 12, 1978, concerning the tariff status of nonwoven fabric, a sample of which was submitted. The merchandise, a needlepunched nonwoven fabric, is stated to be a product of Austria. You also state that the merchandise is 100 percent polypropylene. The material submitted with your sample indicates that the fabric is designed for use in subsoil stabilization in building and other construction applications.

Assuming that the merchandise will be imported in material lengths, it is classifiable under the provision for nonwoven fabrics of manmade fibers, in item 355.25, Tariff Schedules of the United States, with duty at the rate of 12 cents per pound plus 15 percent ad valorem.

The merchandise described above may be subject to import restraints (quotas) based on international textile trade agreements. If you desire further information in this regard, it is suggested that you write directly to our Duty Assessment Division, enclosing a copy of this letter and a sample of the merchandise with your inquiry.

(C.S.D. 79–104)

Classification: Egg Lecithin

Date: July 19, 1978
File: CLA–2:R:CV:MC
059596 MG

This is in reply to your letter of June 15, 1978, concerning the tariff status of egg lecithin, a product of Japan.

The lecithin is imported in both a 60-percent and 98-percent grade. A binding classification is requested to prevent the product from being detained upon importation, since it must remain frozen.

Egg lecithin is classifiable under the provision for other fatty substances of animal origin, not sulfonated or sulfated, fatty-acid esters, ethers, and ether-esters of polyhydric alcohols in item 465.10, Tariff Schedules of the United States, and is dutiable at 1.8 cents per pound plus 7.5 percent ad valorem.

We suggest you present a copy of this ruling at the port of entry to assure prompt processing.

(C.S.D. 79–105)

Classification: Woman's Raincoat; Ornamentation

Date: July 24, 1978
File: CLA–2:R:CV:MC
059553 EA

In your letter of February 16, 1978, you requested advice on the issue of whether a second row of stitching on the edge of a back pleat of a woman's cotton raincoat constitutes ornamentation. As you have pointed out, the identical issue is the subject of Internal Advice Request 10/78.

In Internal Advice Request 10/78, it was determined that the visible second row of stitching served to coordinate the stitching along the

edge of the pleat with other double row stitching on the garment (i.e. seams and hems). While no samples connected with the instant merchandise have been submitted to this office, we are assuming that the second row of stitching enhances to some degree the appearance of the garment. It is further noted, as stated in Internal Advice Request 10/78, that no decisions of the Customs Court and no prior rulings issued by the Customs Service require that all rows of double stitching be considered as not constituting ornamentation.

Accordingly, in the absence of a finding that the second row of stitching performs a necessary and primary reinforcing function, the raincoat is considered an ornamented article in accordance with headnote 3(a)(i), schedule 3, Tariff Schedules of the United States (TSUS), and is classifiable, if in chief value of cotton, under the provision for women's girls' or infants' wearing apparel, ornamented, of cotton, in item 382.00, TSUS.

(C.S.D. 79–106)

Classification: Braided Nylon Twine

Date: August 9, 1978
File: CLA–2:R:CV:MC
059506 EA

This is in response to your letter of May 16, 1978, pertaining to the tariff classification of merchandise from Scotland described as nylon twine. A sample was submitted consisting of a braided tubular sheath of nylon surrounding an inner length of nylon cord. It is assumed for the purpose of this inquiry that the merchandise is imported in continuous lengths.

Headnote 1(a), part 2, schedule 3, Tariff Schedules of the United States (TSUS), defines the term "cordage" as assemblages of textile fibers or yarns in approximately cylindrical form and of continuous length, and does not include braids. Accordingly, the subject merchandise is not classifiable under the cordage provisions of the Tariff Schedules, but is instead classifiable under the provision for braids not suitable for making or ornamenting headwear, tubular with a nonelastic core in item 348.00, TSUS, and is dutiable at the rate of 15 percent ad valorem.

The merchandise described above may be subject to import restraints (quotas) based on international textile trade agreements. If you desire further information in this regard, it is suggested that you write directly to our Duty Assessment Division, enclosing a copy of this letter and a sample of the merchandise with your inquiry.

(C.S.D. 79–107)

Carriers: Foreign-Flag Vessels Used in Lightering Operations From VLCC (Very Large Crude Carrier)

Date: August 16, 1978
File: VES–3–15–R:CD:C
103558 JM

This is in reference to your letter dated June 7, 1978, concerning lightering operations from a stationary facility, which was forwarded to this office for reply by the General Counsel, U.S. Department of Commerce.

You state that a VLCC (very large crude carrier) to be used as a stationary storage facility will be moored in the Gulf of Mexico off Corpus Christi, Tex. You request comments on title 46, United States Code, section 883 (46 U.S.C. 883) concerning coastwise transportation when the VLCC is stationed on the high seas outside the territorial waters of the United States or, in the alternative, when the vessel is stationed inside territorial waters.

With respect to what is meant by "the high seas," the territorial waters of the United States include the "* * * harbors, bays, and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coastline outward a marine league, or 3 geographic miles * * *" *Cunard Steamship et al.* v. *Mellon et al.*, 262 U.S. 100 (1923). All waters beyond this belt are, if not under foreign territorial jurisdiction, the high seas.

Since you are requesting information concerning 46 U.S.C. 883, we will assume that the lightering vessels to be used are foreign-flag or foreign-built vessels. 46 U.S.C. 883 prohibits (with certain exceptions not relevant here) the transportation of merchandise between points in the United States in a foreign-flag vessel, a foreign-built vessel, or a vessel which at one time has been under foreign flag or ownership.

A vessel which lighters cargo from the VLCC situated in territorial waters of the United States would be considered engaged in coastwise trade since it would be transporting merchandise between points in the United States. Therefore, this lightering vessel would have to be coastwise-qualified to engage in that trade.

A U.S.-flag vessel would be prohibited from engaging in the coastwise trade if such vessel were foreign-built, presently under foreign ownership, or if ever under foreign ownership, or under foreign-flag. In this connection, although the matter of vessel documentation falls within the purview of the U.S. Coast Guard, any register issued to such a vessel would bear a restrictive endorsement prohibiting the vessel to which issued from engaging in the coastwise trade.

However, there would be no violation of 46 U.S.C. 883 if a foreign-

flag vesel would depart from a U.S. port to a vessel such as a VLCC anchored outside territorial waters on the high seas to lighter crude oil therefrom. A vessel lightering cargo from the VLCC anchored outside territorial waters in this circumstance would not be considered engaged in coastwise trade.

The above instructions are based on the presumption that the oil aboard the VLCC arrived at the storage facility from a foreign country. Coastwise-qualified vessels would be required for lightering oil to a U.S. port from a VLCC, moored either inside or outside territorial waters if the oil arrived at the VLCC from a point in the United States, either directly or by way of a foreign country. For example, Alaskan oil transported to the VLCC could be lightered only in a coastwise-qualified vessel.

A copy of this letter is being furnished to the Regional Commissioner of Customs at Houston, Tex.

(C.S.D. 79–108)

Classification: Backpacking Tents

Date: August 21, 1978
File: CLA–2:R:CV:MA
054982 GK

DANIEL A. PINKUS, ESQ.,
Assistant Chief Counsel,
Customs Court Litigation,
26 Federal Plaza,
New York, N.Y. 10007.

Re *Mountain Products Corp.* v. *United States*, Customs Court Nos. 75–3–00759 and 75–7–01696
C & H Company, et al. v. *United States*, Customs Court No. 76–3–00884, etc.

DEAR MR. PINKUS: Your letter of April 25, 1978, requests our views concerning the guidelines proposed by your office for the classification of backpacking tents within the meaning of the Customs Court's decision in *The Newman Company, Inc.* v. *United States*, 76 Cust. Ct. 143, C.D. 4648 (1976).

The general guidelines proposed by your office for tents to be classified as sports equipment under item 735.20, TSUS, are as follows:

1. That the tents weigh no more than 10 pounds if they are designed to shelter two persons, and no more than 15 pounds if designed for three or four persons.
2. That they be composed of nylon or dacron, and come with aluminum or fiberglass poles.

3. That the two-person tents have a carry size of between 20 and 24 inches in length, and a diameter of 6 to 8 inches, and that the three- and four-person tents have a carry size of no more than 36 inches in length, and 12 inches in diameter.

Upon receipt of your letter, the area director, New York Seaport, was asked to comment on the proposed criteria. By memorandum dated June 27, 1978 (copy enclosed), the area director took issue with several of the suggested criteria.

The area director believes that the definition of backpacking as "the activity of traveling on foot in relatively wild areas and maintaining oneself with supplies and equipment carried on one's back," as used by the Customs Court, requires clarification. It is noted that by this definition "a scientific expedition up Mount Everest would be considered backpacking." The area director suggests that a "more precise meaning of the term backpacking" be employed, based upon trade and sport publications. We believe, however, that such phrases as "being footloose and independent, free to roam, and sleep where you will," and "something to be done on acres and miles of actual trails," add little in the way of precision to the court's definition. Adoption of such a definition would only serve to obfuscate this issue further.

The area director suggests a different set of criteria from those proposed by your office. One of the more significant differences concerns the number of persons which can be sheltered in a so-called "backpacking tent." While your proposed guidelines suggest that between two and four persons may be accommodated in such tents, the area director believes that four-person tents are not backpacking tents within the commercial meaning because there is no recognizable trade standard for such tents, and because such tents have not been "uniformly described" as backpacking tents. However, several of the manufacturers questioned stated that they sold four-person backpacking tents, and we see no reason why a four-person tent cannot be so classified. To this extent, we are in agreement with your suggested guidelines.

A question has been raised in this office at to whether or not a one-person tent should be considered a backpacking tent. According to the area director, it has been previously established that one-man "pup tents" are not backpacking tents. This office knows of no such practice relating to one-person tents of any type, and we feel such tents are perhaps the least likely to be used for "expedition purposes," as opposed to backpacking uses. While your criteria are silent as to the issue of one-person tents, we believe that these may be considered as backpacking tents, and should be assigned the same weight and size limitations as two-person tents.

The area director feels that two-person tents must weigh not over

8 pounds, including all accessories necessary to pitch the tent, and that three-person tents should weigh not over 10 pounds, including all such accessories. These limits are smaller than those in your proposed guidelines, but we feel that the limits expressed in your letter are more realistic. We note, however, that any suggested weights should be stated as including all accessories necessary to pitch the tent, as proposed by the area director.

Two minor areas of difference between your office and the area director lie in the design of the tents and their composition. The area director seems to feel that dome or pop-up tents should not be considered as backpacking tents. However, he also indicates that dome tents are most frequently found in four-man designs, and pop-up tents in one-man designs. In view of the foregoing comments concerning one- and four-man tents, we believe that such design limitations are unnecessary. We also believe that dacron tents, as well as nylon ones, may be considered as backpacking tents provided the other guidelines for tents of that size are also met.

One further comment is in order concerning the size limitations for two-man tents suggested by your office. You state that the carry size for two-man tents should range from 20 to 24 inches in length, and 6 to 8 inches in diameter. We believe that the suggested lower limits should be deleted, thus allowing tents which measure less than 20 inches in length or less than 6 inches in diameter when being carried, to qualify as backpacking tents.

In conclusion, we propose that the following guidelines be adopted for purposes of both stipulation in pending court cases, and classification at ports of entry for future incoming shipments.

1. Backpacking tents must be composed of nylon or dacron.
2. Such tents must be designed for no more than four persons.
3. If designed for one or two persons, the tents must weigh no more than 10 pounds, including all accessories necessary to pitch the tent, and have a carry size of no more than 24 inches in length and 8 inches in diameter.
4. If designed for three or four persons, the tents must weigh no more than 15 pounds, including all accessories necessary to pitch the tent, and have a carry size of no more than 36 inches in length and 12 inches in diameter.

These guidelines are not intended to be rigid criteria, but only parameters for review on a case-by-case basis. Unless we hear further from your office within 30 days, we will notify all Customs offices of the new guidelines.

289-736—79——5

(C.S.D. 79–109)

Classification: Household Baskets of Palm Leaf and Rattan

Date: October 4, 1978
File: CLA–2:R:CV:MC
059479 PG

This ruling concerns the Customs tariff classification of certain household utilitarian baskets.

Issues.—What is the tariff classification of certain household utilitarian baskets which are more fully described in the facts below?

Facts.—The importation of household utilitarian baskets, products of the Philippines, is proposed. The description of the baskets and their approximate dimensions follow. Whereas no information has been provided as to the construction of the baskets, observations are based on examination of the same.

The first basket is a Tom Tom round basket, measuring approximately 8¾ inches in height, 10 inches in top diameter, and 9½ inches in bottom diameter. It is constructed of coco midrib (the center rib of the coconut leaf).

The second basket is a tapered round basket, measuring approximately 8¼ inches in height, 7⅛ inches in top diameter, and 5$^{1}/_{16}$ inches in bottom diameter. It is constructed of nito coco midrib, a rattan taken from the coconut palm tree.

The third basket basket is a square shape buri basket, measuring approximately 7$^{13}/_{16}$ inches in height, the top measuring approximately 8 inches by 8$^{1}/_{16}$ inches, and the bottom measuring approximately 6½ inches by 6⅜ inches. The bottom and the top frame are made of plywood. The basket's construction consists mainly of buri/rattan sticks which are interwoven with braided palm leaf strips. The chief value appears to be rattan or palm leaf.

The fourth basket is a Tiruray basket, measuring approximately 9$^{1}/_{16}$ inches in height, the bottom measuring approximately 8$^{5}/_{8}$ inches square, and the round top measuring approximately 14 inches in diameter. It appears to be constructed of interwoven split rattan strips.

Law and Analysis.—The four baskets, if "of rattan or of palm leaf," are classifiable under the provision for baskets and bags, of unspun fibrous vegetable materials, whether lined or not lined, in item 222.42, Tariff Schedules of the United States (TSUS). An article is "of" rattan or "of" palm leaf if it is wholly or in chief value of palm or rattan. (See General Headnote 9(f)(i), TSUS.) General Headnote 10(f) states that "an article is in chief value of a material if such material exceeds in value each other single component material of the

article." Assuming the baskets are in chief value of rattan or of palm leaf, they are classifiable in item 222.42, TSUS.

Holding.—Household utilitarian baskets, if in chief value of rattan or of palm leaf, are classifiable in item 222.42, TSUS, and dutiable at 25 percent ad valorem. These baskets, however, may be subject to duty-free treatment from the Philippines for purposes of the Generalized System of Preferences, provided for in title V of the Trade Act of 1974, if they meet the requirements for eligibility. (See General Headnote 3(c), TSUS; copy attached.)

(C.S.D. 79–110)

Entry: Merchandise Invoiced at More Than $250, but Appraised at Less Than $250; Informal Entry

Date: October 18, 1978
File: ENT–1–01 R:E:E
306531 K

This is in further reference to your letter of September 11, 1978, requesting our advice as to the proper form of consumption entry required in the following two examples which you cited:

1. A shipment invoiced in Canadian funds at $260 is, after currency conversion, reduced to a value of under $250.
2. A shipment valued at $260 is accompanied by an invoice which states that this value includes duties and customhouse brokers charges. When these charges are deducted, the value is below $250.

In both of these cases, the appraised value will be below $250. Consequently, an informal entry will be acceptable in both cases, unless the district director requires a formal entry under section 143.22 of the regulations.

(C.S.D. 79–111)

Brokers: Powers of Attorney Issued by a Customhouse Broker to Other Brokers in Other Ports

Date: October 23, 1978
File: BRO 4–01 R:E:E
306445 W

This refers to your letter of August 22, 1978, inquiring as to whether an importer may issue a power of attorney to one (broker A) that would empower that broker to issue, on the importer's behalf, powers

of attorney to other brokers on other ports. Your letter states that these other brokers would not be agents or delegees of broker A but would have the same relationship to the importer as does broker A, and would bill and be paid by the importer directly and not through broker A. The only difference would be that broker A, acting for the importer, would issue the necessary powers of attorney to the other brokers.

As we understand this arrangement, the brokers appointed by broker A would not be subagents of broker A but, rather, would be considered agents of the principal (i.e., the importer) because the importer's power of attorney to broker A would specifically authorize broker A to appoint these other brokers and because these other brokers, once appointed, would act solely on account of the importer and bear no agency relationship to broker A. Therefore, you are correct in stating that section 141.43 of the Customs Regulations, which applies to subagents, is inapplicable here.

Accordingly, as we find no other provisions prohibiting it, the arrangement suggested by your letter is permissible under the Customs Regulations.

ERRATUM

CUSTOMS BULLETIN, Vol. 13, No. 11, March 14, 1979, page 16, should read as follows:

1. Line 11, "Highway 63 within section 24 (and Park Road within section 25) of"
2. Line 21, "35 of T. 47 N., R. 1 W. of Soo Township; sections 2, 11, 14, 15,"

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1221)

THE UNITED STATES v. SORTEX CO. OF NORTH AMERICA, INC. No. 78–14 (—F. 2d—)

1. Classification of Imports—Color Sorting Machines—TSUS

Customs Court decision, sustaining importer-appellee's claim that electronic color sorting machines were chiefly use das industrial machinery for preparing and manufacturing food, and therefore more specifically provided for under TSUS item 666.25 than TSUS item 712.49, affirmed.

2. Id.—Cited case not applicable

Rationale of Customs Court in *Bruce Duncan Co., Inc., A/C Staalkat of America, Inc.* v. *United States*, not applicable because prior to operation of color sorters, food not ready for consumption.

3. Id.—More valuable for its intended use

Color sorters are industrial machinery for preparing and manufacturing food because they were chiefly used to change the character of food, advance it in condition and make it more valuable for its intended use.

4. Id.—Item 666.25

The word "manufacturing" does not create where-used requirement in TSUS item 666.25.

5. Preparing and Manufacturing

Phrase "for preparing and manufacturing" cannot create two for-what chiet use requirements in TSUS item 666.25, since it is impossible to have two chief uses under definition of chief use in TSUS General Interpretative Rule 10(e)(i).

6. Id.—Machine need not be chiefly used on line in manufacturing operation.

Machine need not be chiefly used on line in manufacturing operation to fall within TSUS item 666.25.

7. Chief use of articles of same class or kind.

Government's objection to testimony concerning chief use of articles of class or kind to which imported merchandise belongs coupled with its failure to raise issue of whether chief use of imported merchandise is representative of chief use of articles of same class or kind constituted implied admission that chief use of imported merchandise is representative of chief use of articles of same class or kind.

8. Implied Admission

Equity demands that behavior precluding resolution of issue at trial be construed as implied admission that issue not in dispute.

U.S. Court of Customs and Patent Appeals, March 29, 1979

Appeal from U.S. Customs Court, C.D. 4746

[Affirmed.]

Barbara Allen Babcock, Assistant Attorney General, *David M. Cohen*, Branch Director, *Sheila N. Ziff* for the United States.

Barnes, Richardson & Colburn, Steven P. Sonnenberg for appellee.

[Oral argument on February 5, 1979 by Sheila N. Ziff for appellant and by Steven P. Sonnenberg for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE, and MILLER, *Associate Judges*.

LANE, Judge.

[1] This appeal is from the judgment of the U.S. Customs Court, 80 Cust. Ct. 134, C.D. 4746, 453 F. Supp. 644 (1978), which sustained the importer-appellee's claim that at the time of importation the imported merchandise, electronic color sorting machines, were chiefly used as industrial machinery for preparing and manufacturing food for human consumption, and therefore, are more specifically provided for under item 666.25 of the Tariff Schedules of the United States (TSUS) as modified by Presidential Proclamation 3822, T.D. 68–9, 32 F.R. 19002 (1967) (hereinafter referred to as TSUS item 666.25), as other industrial machinery for repairing and manufacturing food or drink, than under item 712.49 of the TSUS as modified by Presidential Proclamation 3822, supra (hereinafter referred to as TSUS item 712.49), as other electrical measuring, checking, analyzing, or automatically controlling instruments and apparatus. We affirm.

Background

Imported Merchandise

The importations involved herein consist of merchandise known as Sortex models 964 and 964C electronic color sorting machines. These machines sort objects by passing them single file through optical chambers, where electronic photosensors compare their color to a preset background. When an object does not approximate the predetermined color, it is separated from the stream of acceptable product by an electronically-triggered air blast.

Competing TSUS Provisions

This merchandise was imported into the United States in January 1974, and assessed with duties of 10 percent ad valorem under TSUS item 712.49:

	(a) Electrical measuring, checking, analyzing or automatically controlling instruments and apparatus, and parts thereof:	
* * * * * * *		
	Other	
* * * * * * *		
712.49	Other	10% ad val.

The importer protests that at the time of importation the merchandise was chiefly used as industrial machinery for preparing and manufacturing food, and therefore is more specifically provided for in TSUS item 666.25:

	(b) Industrial machinery for preparing and manufacturing food or drink, and parts thereof:	
	* * * *	
666.25	Other	5.5% ad val.

Evidence Presented at Trial

The importer's chief witness, Daniel Garnett, an engineer with 10 years' experience in the development, application, installation, and marketing of these machines, testified with regard to the installation and use of all 86 Sortex model 962 [1] and 964 machines imported into the United States over a period of several years up to January 1974. Garnett testified and the Government agreed to stipulate that:

46 machines were used in sorting bulk products such as beans, peanuts, cracked corn and corn which were sold in large quantities after the sorting operation;

14 machines were used to sort food items in a processing line which resulted in a packaged labeled product, such as peanut butter;

1 machine was used to sort peanuts that were either used for seed or sold in bulk;

2 machines were used to sort shelled, cleaned peanuts which were put into bulk bags;

7 machines were used to sort roasted, blanched peanuts;

5 machines were used to sort seed for planting purposes;

3 machines were used to sort plastics and minerals;

[1] It was stipulated that the model 962 machine is the same as the model 964 machine which superseded it in production.

3 machines were not in use; and

5 machines Garnett had no personal knowledge of.

Garnett also testified, and the Government did not dispute, that the products sorted and sold in bulk (i.e., the food these machines were chiefly used on) had to meet either Federal or State grading standards for marketing.

Garnett attempted to testify about machines of the same class or kind as the Sortex 962 and 964. However, the Government objected to this line of testimony. This objection was sustained on the ground that such testimony had no relevance to this case.

Decision Below

The Customs Court took as its starting point a modification of our definition of the word "prepared" in the tariff sense as related to food, i.e., that the food has been so processed as to be changed in character or advanced in condition and made more valuable for its intended use. *Stone & Downer Co.* v. *United States*, 17 CCPA 34, 36, T.D. 43323 (1929). (The phrase "changed in character" is not found in the *Stone & Downer* definition.) The court concluded that the chief use of the Sortex color sorters was as industrial machines for preparing and manufacturing food by sorting, grading and screening food items for human consumption. The court noted that the 1969 " Summaries of Trade and Tariff Information," while not controlling, listed among machines covered by TSUS item 666.25, machines which sort, grade, and screen, precisely what the machines in question did. As between TSUS item 666.25, other industrial machinery for preparing and manufacturing food or drink, and TSUS item 712.49, other electrical measuring, checking, analyzing, or automatically controlling instruments and apparatus, the court determined that the former more specifically provides for the Sortex color sorters. Accordingly, the court entered judgment in favor of plaintiff-importer.

Issues Raised on Appeal

In this appeal, the Government contends that the Customs Court decision that the imported machines fall within the ambit of TSUS item 666.25 is erroneous.[2] The Government makes three separate arguments in support of this contention. It argues: (1) The machines were not chiefly used to "prepare * * * food" within the *Stone & Downer* definition of that term; (2) the machines were not chiefly used on line in a manufacturing process and therefore are not industrial machinery for manufacturing food or drink; and (3) the importer has not proven that electronic color sorters of the class or kind to

[2] The Government does not press its contention that, assuming TSUS item 666.25 applies to the imported merchandise, TSUS item 712.49, nonetheless, more specifically describes the machines.

which the importations belong were chiefly used in preparing and manufacturing food or drink.

OPINION

I

[2] In support of its position that the Sortex color sorters do not fall within the modified *Stone & Downer* definition of the phrase "preparing * * * food," i.e., do not change the character of the food or advance it in condition and make it more valuable for its intended use, the Government cites *Bruce Duncan Co., Inc., A/C Staalkat of America, Inc.* v. *United States*, 67 Cust. Ct. 430, C.D. 4312 (1971). That case involved Staalkat egg handling machines which sorted by weight, candled, graded, and marked eggs, The Customs Court held that the Staalkat egg handlers were not industrial machinery for preparing food, as defined in *Stone & Downer*, and therefore did not fall within TSUS item 666.25.

Although we agree with the Government that the Sortex color sorters and the Staalkat egg handlers perform very similar functions, we nevertheless conclude that the Customs Court's rationale for holding as it did in *Staalkat* is not applicable to the case at bar. In *Staalkat*, the Customs Court's decision is based on its conclusion that the Staalkat egg handler "merely processes for marketing food that is ready for consumption." 67 Cust. Ct. at 435. This is not the case with the chief use of the Sortex color sorters. All of the products sorted and sold in bulk (i.e., the food these machines were chiefly used on) had to meet either Federal or State grading standards for marketing. Thus, it is clear that prior to operation of the Sortex color sorters, the food was not ready for consumption.

[3] By separating out defective food particles and foreign substances, the Sortex color sorters upgraded the quality of the commodity sorted, enabling it to meet federal and state grading standards. This constituted a change in the character of the food. A bushel of unacceptable, low-grade corn or peanuts was converted into a bushel of acceptable, higher-grade corn or peanuts. In this way the Sortex color sorter advanced the agricultural commodity in condition and made it more valuable. For this reason we agree with the Customs Court that at the time of importation the Sortex color sorters were chiefly used as industrial machinery for preparing and manufacturing food.

II

The Government also argues that the conjunctive "and" which joins "preparing" to "manufacturing" in TSUS item 666.25,

> Industrial machinery for preparing *and* manufacturing food or drink * * * Other * * *. [Italic added.]

creates a dual requirement. According to the Government, to fall within this provision a machine must be used both for preparing food or drink and for manufacturing food or drink. The Government accepts the Customs Court's version of the *Stone & Downer* definition of the phrase "industrial machinery for preparing food or drink," i.e., machinery which changes the character of the food or advances it in condition and makes it more valuable for its intended use. The Government submits that the phrase "industrial machinery for manufacturing food or drink" should be defined as machinery used on line in a manufacturing process. Under this interpretation, the Sortex color sorters would not fall within TSUS item 666.25, since only 14 of 86 were used on line in connection with a manufacturing process.[3]

[4] We cannot adopt the Government's interpretation of TSUS 666.25, because it ignores the grammatical construction of the provision. In the heading "Industrial machinery for preparing and manufacturing food of drink" both verbs are used in the identical form, as gerunds following the preposition "for." The Government would have us construe the first gerund, "preparing," as establishing *for what* the machine must be used, and the second gerund, "manufacturing," as establishing *where* (in or at what place) the machine must be used. Such a construction disregards the fact that both gerunds are objects of the preposition "for." If Congress had intended to create a where-used requirement, it would have used another prepositional phrase, e.g., industrial machinery for preparing food or drink in a manufacturing operation. Since both gerunds follow the preposition for, both must be construed as establishing the for-what-use requirement.

[5] Furthermore, since TSUS item 666.25 is a chief use provision, the phrase "for preparing and manufacturing food or drink" cannot be construed as creating two for-what chief use requirements, it being impossible to have two chief uses under the definition of chief use in TSUS General Interpretative Rule 10(e)(i). This rule defines chief use as "the use which exceeds all other uses (if any) combined." Obviously, there cannot be two uses each of which exceeds all other uses combined.

In view of this and the fact that there is only a subtle distinction between the meaning of the verbs "prepare" and "manufacture" when used in the context of foods (e.g., Is frozen orange juice prepared or manufactured?), we conclude that the phrase "for preparing and

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[3] It is not disputed that TSUS item 666.25 is a chief use provision, and therefore, governed by TSUS General Interpretative Rule 10(e)(i) which defines chief use as the use which exceeds all other uses combined:

10. *General Interpretative Rules.* For the purposes of these schedules—

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined * * *.

manufacturing food or drink" must be construed as creating just one for-what chief use requirement. This interpretation is consistent with the subheadings inferior to the heading in question, since in two of these subheadings, either a form of the verb prepare or a form of the verb manufacture, but not both, is used. TSUS item 666.20 ("Machinery for use in the *manufacture* of sugar"); subheading under TSUS item 666.25 ("Machinery for *preparing* and processing fruits and vegetables"). (Italic added.)

[6] Since the Sortex color sorters were chiefly used for changing the character of food, advancing it in condition, and making it more valuable for its intended use, they were properly classified as industrial machinery for preparing and manufacturing food. The fact that only 14 of 86 machines were used on line in a manufacturing operation is irrelevant.

III

In its final argument, the Government maintains that plaintiff-importer failed to present sufficient evidence to make out a prima facie case that the imported merchandise is covered by TSUS item 666.25, because it did not introduce evidence concerning the chief use of articles of the class or kind to which the imported merchandise belongs.

It is undisputed that TSUS item 666.25 is a chief use provision. General Interpretative Rule 10(e)(i), which governs such provisions, provides for use to be determined by chief use, in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong. Thus, to prove its case, the importer had to show that at, or immediately prior to, January 1974, color sorters of the class or kind to which the Sortex 964 and 964C belong were chiefly used in preparing and manufacturing food or drink.

At trial the importer attempted to introduce evidence concerning color sorters of the class or kind to which the Sortex 964 and 964C belong, but the Government objected to this line of testimony. The judge sustained this objection, apparently because he was under the impression that color sorters of the class or kind to which the Sortex 964 and 964C belong were not relevant to any factual issue in dispute. The following excerpt from the record at trial constitutes the complete discussion of this point:

> QUESTION. Would you please describe what you would regard as the characteristics of a dry electronic color sorting machine of the same class or kind as the 964 machine?
>
> Mrs. ZIFF. I object. If he is talking about the 964. Again, counsel is going back to the same thing, to bring in testimony

which will lead to machines pending in other cases, not been noticed for trial, not even been the subject of motions to suspend. I have no objections to testimony as to the development of the 964 within the realm of his expertise.

Mr. SONNENBERG. And there can't be any question that the class or kind of machines to which the 964 belongs is always an issue in this case.

Judge RICHARDSON. Just take the 964 machine. We don't need the others. Limit it, Mr. Sonnenberg.

QUESTION. Would you consider the 964 and 962 machine to be of the same class or kind as the electronic tomato harvester machine you are working with now?

Judge RICHARDSON. Objection sustained.

Mr. SONNENBERG. Can we agree that any inquiry about the tomato harvester is not relevant to this case?

Judge RICHARDSON. Sure.

[7] The only possible basis for the judge's conclusion that testimony about color sorters other than the Sortex 964 and 964C was unnecessary is that he assumed that the parties did not dispute that the chief use made of the Sortex 964 and 964C was representative of the chief use made of color sorters of the same class or kind. The Government never offered any evidence to the contrary, nor did it say anything to correct this assumption. If the Government intended to contest the issue of whether the chief use made of the Sortex 964 and 964C was representative of the chief use made of color sorters of the same class or kind, it should have done so at trial where the issue could have been resolved. [8] By its behavior, the Government precluded resolution of this issue. Equity demands that we construe such conduct as an implied admission that this issue was not in dispute.

Therefore, we conclude that plaintiff-importer established that at, or immediately prior to, the date of importation, color sorters of the class or kind to which the Sortex 964 and 964C belong, were chiefly used in preparing and manufacturing food or drink, because the importer established that at that time the Sortex 964 and 964C were so used, and the Government, by its conduct at trial, impliedly admitted that the uses made of the Sortex 964 and 964C were representative of the uses made of color sorters of the same class or kind.

Accordingly, for the reasons set forth herein, the decision of the Customs Court is *affirmed.*

MILLER, Judge, concurs in result.

Decisions of the United States Customs Court

Customs Decision

(C.D. 4792)

ALBERTA GAS CHEMICALS, INC. *v.* W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ROBERT H. MUNDHEIM, GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY, ROBERT E. CHASEN, COMMISSIONER OF CUSTOMS, AND THE UNITED STATES OF AMERICA

Opinion and Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Dismissal

Court No. 78-8-01418

[Defendants' cross-motion for dismissal granted; plaintiff's motion for summary judgement denied.]

Order dated March 15, 1979

Opinion promulgated March 23, 1979

Freeman, Meade, Wasserman & Schneider (*Bernard J. Babb* and *Herbert Peter Larsen* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendants.

NEWMAN, Judge: Plaintiff, who inter alia is an importer of methyl alcohol (methanol or wood alcohol) from Canada, seeks a declaratory judgment pursuant to 28 U.S.C. 2201 declaring that the Secretary of the Treasury (Secretary) lacked authority to initiate an investigation under the Antidumping Act of 1921, as amended (19 U.S.C. 160 et seq.) (Antidumping Act), and requiring that defendants should refrain from the prosecution of such investigation. Additionally, plaintiff requests "whatever ancillary relief may be necessary and proper pursuant to 28 U.S.C. 2202".

Presently before the court are plaintiff's motion for summary judgment under rule 8.2. of the rules of this court, and defendants' cross-motion for dismissal under rule 4.7(b) on the ground that the court lacks jurisdiction of the subject matter of this action.

After careful consideration of both counsel's memoranda of law and affidavit of plaintiff's president, John J. LoPorto, filed in support of plaintiff's motion, I have concluded that defendants' motion for dismissal must be granted. Accordingly, I do not reach the issue of the validity of the Secretary's determination to initiate the antidumping investigation.

I

The material facts, which are not in dispute, may be briefly summarized:

On May 2, 1978, the Secretary received information "in proper form", in accordance with sections 153.26 and 153.27, Customs Regulations (19 CFR 153.26, 153.27) from E. I. du Pont de Nemours & Co., alleging that methanol exported from Canada is being, or is likely to be, sold at less than fair value within the meaning of the Antidumping Act. On the basis of this information and subsequent preliminary investigation by the Customs Service, an "Antidumping Proceeding Notice", dated June 8, 1978, was published in the Federal Register of June 14, 1978 (43 F.R. 25758). This notice stated, inter alia, that the Customs Service was instituting an investigation "to verify the information submitted and to obtain the facts necessary to enable the Secretary of the Treasury to reach a determination as to the fact or likelihood of sales at less than fair value".

By a letter (captioned "Protest/Notice of Intent to Contest 43 F.R. 25758, June 14, 1978") dated June 23, 1978, to the Secretary, the Commissioner of Customs and the General Counsel of the Treasury Department, plaintiff contested the initiation of the antidumping

investigation. In essence, the predicate of plaintiff's "protest" was that the Secretary's determination on June 8, 1978 to initiate the investigation was made more than 30 days after receipt of information (on May 2, 1978), and consequently the determination and investigation are void and ultra vires, since they contravene the time limit prescribed by 19 U.S.C. 160(c)(1).[1] In a reply letter dated July 7, 1978, the Treasury Department informed plaintiff that it was proceeding with the antidumping investigation notwithstanding that such investigation was initiated more than 30 days after the du Pont petition was filed, since assertedly the statutory time limit is directory rather than mandatory.

A "Withholding of Appraisement Notice" respecting methanol from Canada was published in the Federal Register of December 19, 1978 (43 F.R. 59196).

II

The gravamen of plaintiff's action is that under 19 U.S.C. 160(c)(1) the Secretary's authority to initiate the full scale investigation of the information submitted by du Pont on May 2, 1978, terminated by operation of law 30 days after receipt of such infomation, viz., on June 1, 1978. Consequently, according to plaintiff, the Secretary's determination on June 8, 1978, to institute an investigation and the publication of the "Antidumping Proceeding Notice" on June 14, 1978, are illegal and ultra vires acts, as are all subsequent proceedings in the matter.

III

Initially, we must consider the threshold jurisdictional issue presented. In support of their cross-motion to dismiss, defendants insist that the statutory prerequisites for invoking the court's jurisdiction under 28 U.S.C. 1582 have not been complied with.

Preliminarily, it should be observed that there is no dispute in this case that under section 1582 the Customs Court has subject matter jurisdiction over actions arising under the Antidumping Act. "In such cases (the Customs Court) may review the actions of the Secretary of the Treasury and the Tariff Commission (now U.S. International Trade Commission) to determine whether the procedures prescribed by Congress have been followed and whether the Secretary, the Traiff Commission, or their delegates have proceeded within the statutory

[1] This provision reads: "(c)(1) The Secretary shall, within 30 days of the receipt of information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value. If his determination is affirmative he shall publish notice of the initiation of such an investigation in the Federal Register. If it is negative, the inquiry shall be closed."

authority or whether their actions are ultra vires and void". *Matsushita Electric Industrial Company, Ltd.* v. *United States Treasury Department*, 67 Cust. Ct. 328, 331, C.D. 4992 (1971), aff'd, 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402 (1973), cert. denied, 414 U.S. 821 (1973). However, to borrow phraseology from *Matsushita*, the present case "is outside the framework of the general statutory scheme for customs litigation and the question is whether this court has any authority to entertain it". 67 Cust. Ct. at 331.

Prior decisions have stressed "the precise and narrow jurisdictional limits within which this court operates". *Russell Stanfield Dexter* v. *United States*, 78 Cust. Ct. 179, C.R.D. 77–1, 424 F. Supp. 1069 (1977). *Accord, United States* v. *Nils A. Boe*, 64 CCPA 11, C.A.D. 1177, 543 F. 2d 151 (1976); *Matsushita, supra*. See also Judge Richardson's well reasoned decision in *Flintkote Company, Glens Falls Division* v. *United States* (*Independent Cement Co., Party-in-Interest*), 82 Cust. Ct. —, C.R.D. 79–5 (1979). Cf. Judge Foley's recent unreported memorandum-decision and order in *Flintkote Company, Glens Falls Division* v. *W. Michael Blumenthal, Secretary of the Treasury*, Civil Action 78–CV–640 (N.D.N.Y. 1979), decided February 16, 1979, aff'd, — F. 2d — (C.A. 2, March 19, 1979). Indeed, our Court of Appeals has noted that 28 U.S.C. 1582 "both establishes and limits the jurisdiction of (the Customs) Court". *Boe*, 64 CCPA at 15–16.

Section 1582 provides, so far as pertinent herein:

§ 1582. Jurisdiction of the Customs Court

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) The appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.
>
> (b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.
>
> (c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516

of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

* * * * * * *

As may be seen above, section 1582(c) explicitly confines this court's juridiction to actions in which: (1) Either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514), and denied in accordance with section 515 of the Tariff Act of 1930, as amended (19 U.S.C. 1515), or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), all remedies prescribed therein have been exhausted; and (2) all liquidated duties, charges or exactions have been paid at the time the action is filed, except in the case of an action relating to a decision under section 1516. The jurisdictional prerequisites under section 1582 are mandatory, "the statute having provided no room or opportunity for the exercise of discretion". *Boe*, 64 CCPA at 16.

IV

Plaintiff posits that it has fulfilled "all applicable conditions" under sections 1514 and 1515 (reply brief at 9). Section 1514 lists seven categories of administrative decisions which may be protested (including the legality of all orders and findings entering into the same). Thus, section 1514, so far as pertinent, reads:

§ 1514. Protest against decision of appropriate customs officer

(a) Finality of decisions; return of papers

Except as provided in section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the U.S. Customs Court in accordance with section 2632 of title 28 within the time prescribed by section 2631 of that title. When a judgment or order of the U.S. Customs Court has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

(b) Form, number, and amendment of protest; filing of protest

(1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer designated in regulations prescribed by the Secretary, setting forth distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; each category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor. * * *

* * * * * * *

As previously mentioned, plaintiff claimed in its letter of June 23, 1978, that the Secretary's determination to initiate an antidumping investigation was untimely, and therefore the determination and investigation are void and ultra vires. In an apparent effort to bring its claim within one of the seven categories of administrative decisions enumerated in sections 1582(a) and 1514(a), plaintiff points to the language in subdivision (a)(3) in sections 1582 and 1514 "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury" (including the legality of all orders and findings entering into the same). Thus, plaintiff advances the argument that it is contesting an order or finding entering into a "charge or exaction" within the purview of section 1582(a)(3) and section 1514 (a)(3). I find no merit in this contention.

The terms "charges" and "exactions" as used in subdivision (a)(3) of sections 1582 and 1514 were not intended to embrace an interlocutory determination by the Secretary to initiate and antidumping investigation. Rather, from a review of a long line of cases involving "charges" and "exactions", it is obvious that these terms have been applied to actual assessments of specific sums of money (other than ordinary customs duties) on imported merchandise. See, e.g., *United States* v. *Davies Turner & Company*, 48 CCPA 159, C.A.D. 784 (1961); *Puget Sound Freight Lines* v. *United States*, 36 CCPA 70, C.A.D. 400 (1949); *Guy B. Barham Co.* v. *United States*, 35 CCPA 138, C.A.D. 385 (1948); *United States* v. *Frank F. Smith & Co.*, 25 CCPA 163, T.D. 49267 (1937); *United States* v. *Hawley & Letzerich*, 17 CCPA 110, T.D. 43452 (1929); *United States* v. *Frame & Co.*, 13 Ct. Cust. Appls. 603, T.D. 41457 (1926); *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust.

Appls. 373, T.D. 34872 (1914); *United States* v. *Masson*, 4 Ct. Cust. Appls. 363, T.D. 33534 (1913); *Arbuckle Bros.* v. *United States*, 3 Ct. Cust. Appls. 105, T.D. 32362 (1912); *J. M. Altieri* v. *United States*, 38 Cust. Ct. 498, Abs. 60742 (1957); *W. X. Huber* v. *United States*, 29 Cust. Ct. 92, C.D. 1451 (1952), *rev'd on other grounds, United States* v. *W. X. Huber*, 41 CCPA 69, C.A.D. 531 (1953); *L.A. Importing House* v. *United States*, 16 Cust. Ct. 1, C.D. 974 (1945), decided on rehearing, 19 Cust. Ct. 94, Abs. 51789 (1947). In the instant case, there has been no assessment of any "charge" or "exaction", nor any order or finding entering into a charge or exaction.

V

The thrust of defendants' motion to dismiss is premised on the argument that because of the particular statutory constraints on this court's jurisdiction, the instant action is premature and anticipatory. I agree.

Procedurally, the Antidumping Act requires, first, a determination by the Secretary that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than fair value (LTFV); and second, if the Secretary's determination is affirmative, a determination by the International Trade Commission as to whether an industry in this country is being, or is likely to be, injured, or is prevented from being established by reason of the importation of such merchandise at LTFV. Affirmative findings by both the Secretary and the Commission result in a finding of "dumping", which is published in the Federal Register by the Secretary.[2] Merchandise subject to the dumping finding, including entries of such merchandise as to which appraisement has been withheld pending resolution of the dumping question, is thereupon appraised and assessed with a special dumping duty in addition to any other duties imposed thereon by law. 19 U.S.C. 160 et seq. The general procedures followed in an antidumping investigation are thoroughly discussed by Chief Judge Re in a landmark case, *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 80 Cust. Ct. 226, C.R.D. 78–2, 450 F. Supp. 1178 (1978), and for present purposes need not be further pursued. The importer, consignee or authorized agent of the person paying such duties may then file a protest as prescribed by section 1514 and, upon its denial, may commence a civil action in this court, under 28 U.S.C. 2632.

In short, it is only in the event that there are affirmative LTFV and injury determinations and dumping duties are actually assessed

[2] Obviously, these requisite affirmative determinations may not materialize in the instant antidumping proceedings. Since the investigation contested herein may never ultimately culminate in a finding of dumping, plaintiff's characterization of the Secretary's determination on June 8, 1978, as "final agency action" (brief at 18) is plainly erroneous.

that plaintiff may contest the legality of the Secretary's determination to initiate the antidumping investigation challenged herein. Consequently, inasmuch as there has been no liquidation nor assessment of dumping duties but merely the Secretary's determination to initiate the antidumping proceeding, the filing of the so-called "protest" and the commencement of the present action were premature and anticipatory.

Matsushita explicitly held that the Customs Court lacked jurisdiction under the All Writs Act (28 U.S.C. 1651) to grant injunctive and declaratory relief against antidumping proceedings wherein the Secretary had made an affirmative LTFV determination, but no dumping duties had been levied.

In *J. C. Penney Company, Inc.* v. *United States Department of the Treasury*, 319 F. Supp. 1023 (S.D.N.Y. 1970), aff'd, 439 F. 2d 63 (C.A.2 1971), cert. denied, 404 U.S. 869 (1971), the plaintiff (an importer of television sets from Japan) sought declaratory and injunctive relief in the District Court preventing the Treasury Department from conducting an investigation into whether the television sets were being sold at LTFV, alleging that the methods employed by the Treasury Department in making its LTFV determination violated due process. Plaintiff sought relief in the District Court on the ground, inter alia, that the Customs Court lacked jurisdiction over the controversy since no protest could then be filed.

The Court of Appeals, in affirming the District Court's dismissal of the action for lack of subject matter jurisdiction, addressed itself to Penney's remedy in the Customs Court (439 F. 2d at 68):

> * * * Thus the only remedy available to Penney is the obtaining of refunds of special dumping duties which may have been improperly assessed and paid. Though it may be true that the ordering of a hearing would be a more desirable form of relief from Penney's point of view than the obtaining of refunds, the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate. We conclude that there is, in fact, an adequate remedy available to Penney in the Customs Court. * * *

Again, in *Manuli Tape, Inc.* v. *Daniel Minchew*, Civil Action 77–1152 (D.D.C. 1977), plaintiffs sought a declaratory judgment in the District Court that the International Trade Commission (ITC) lacked authority to conduct a certain antidumping investigation and an injunction prohibiting the ITC from continuing its investigation. In an unpublished memorandum order dated July 26, 1977 denying plaintiffs' motion for preliminary injunctive relief and dismissing the action, the court declined to address the merits of the case on the ground that the issue fell within the exclusive jurisdiction of the Customs Court. The District Court then significantly commented

respecting plaintiffs' remedy in the Customs Court and "the procedure contemplated by Congress":

> To be sure, plaintiffs are correct in arguing that the Customs Court would not entertain a motion to enjoin the Commission's investigation *at this time*. This in no way, however, means that the court cannot provide plaintiffs an adequate remedy. *Rather, plaintiffs must await the outcome of the Commission's investigation; after the Antidumping process has run its course and if adverse action is taken against plaintiffs, the Customs Court can entertain the issue they raise.* As the statutes and cases referred to above make clear, such is the procedure contemplated by Congress. [Italic added in part.]

In summary, plaintiff's situation is this: If a finding of dumping is ultimately made by the Secretary, and dumping duties are assessed on plaintiff's imports of methanol, plaintiff will then, in a suit for refund of such duties, have the opportunity in a single proceeding to challenge all orders and findings entering into the assessment, including the legality of the investigation presently contested.

In *Boe, supra*, 64 CCPA at 17–18, Chief Judge Markey pointed out that the exercise of jurisdiction by this court prior to the payment of all liquidated duties would foster piecemeal litigation. This consideration is especially apposite where a plaintiff is seeking judicial intervention into an antidumping proceeding at an interlocutory stage, as in the present case. Thus, if plaintiff is properly entitled to judicial review at the investigatory stage of an antidumping proceeding, plaintiff would logically have the right to contest each subsequent phase of the antidumping proceedings, as well as a right of action after an assessment of dumping duties, if such assessment should materialize. Obviously, the jurisdictional scheme applicable to this court under 28 U.S.C. 1582 never contemplated the possibility of such piecemeal challenges to an antidumping proceeding at interlocutory stages.

Plaintiff urges judicial intervention at the present investigatory stage of the antidumping proceedings on the ground that the Secretary's asserted lack of authority to conduct the investigation cannot be raised at a later stage. In support of this contention, plaintiff cites *United States* v. *Elof Hansson, Inc.*, 48 CCPA 91, C.A.D. 771, 296 F. 2d 779 (1960), cert. denied, 368 U.S. 899 (1961). There, the Court of Customs and Patent Appeals held that an alleged procedural irregularity in an antidumping investigation (failure to publish notice of investigation) "should have been raised by timely objection at the administrative level" and that such objection was "waived by participating in the antidumping investigation without making timely objection to the Secretary of the Treasury" (48 CCPA at 95).

Hansson is plainly distinguishable from the present case. In *Hansson*,

the Appellate Court found that "[a]t no time during the course of the entire investigation was any issue raised before the Secretary, either directly or through the Customs Bureau, of any procedural irregularities in the investigation * * *" (48 CCPA at 94). Continuing, the court characterized Hansson's position as being "clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and [which] can prevail only from technical compulsion irrespective of considerations of practical justice" (48 CCPA at 95). By contrast, in the present case, plaintiff has timely asserted its objections to the investigation in its "Protest/Notice of Intent to Contest" dated June 23, 1978.

Consequently, there can be no doubt that in the antidumping proceedings challenged herein plaintiff has timely raised its objections before the Secretary and other appropriate officials, and therefore has preserved its right to have the Secretary's determination of June 8, 1978 reviewed at the appropriate time.

VI

Plaintiff also argues that since du Pont, an American manufacturer, had the right under 19 U.S.C. 1516 to contest a negative determination by the Secretary respecting sales at LTFV, plaintiff is likewise entitled to "equally immediate review" (brief at 17). This position is erroneous.

A negative LTFV determination by the Secretary terminates the antidumping proceeding and, as a final administrative determination, such negative LTFV determination is contestable in an action brought by an American manufacturer under section 1516. On the other hand, if the Secretary makes an affirmative LTFV determination, such decision is merely interlocutory in the antidumping proceedings since, as previously mentioned, the question as to whether there is injury must still be investigated and determined by the International Trade Commission. The 1974 Trade Act did not give an importer the right to contest an affirmative LTFV determination, or any other decision of the Secretary at an interlocutory stage of an antidumping proceeding.

VII

Plaintiff further contends that under 28 U.S.C. 1582 this suit is "an action relating to a decision under section 516 of the Tariff Act of 1930, as amended", and hence the payment of "all liquidated duties, charges and exactions" is not a condition precedent to invoking the court's jurisdiction. This contention is fundamentally at odds with the statute.

---

[9] Plaintiff asserts that it is an "American wholesaler" within the purview of section 1516.

Section 516 (19 U.S.C. 1516) provides for an action by an American manufacturer, producer or wholesaler[3] who wishes to contest a negative LTFV determination by the Secretary or his decision not to assess antidumping duties. Clearly, in the present case, plaintiff is not challenging a negative LTFV determination or a decision of the Secretary not to assess antidumping duties. Therefore, this action, which contests merely the initiation of an investigation, is not "an action relating to a decision under section 516 of the Tariff Act of 1930, as amended" within the purview of section 1582.

VIII

Plaintiff submits several other arguments, which merit but brief discussion.

As authority for subject matter jurisdiction in this action and the relief sought herein, plaintiff heavily relies upon the Administrative Procedure Act, as amended (specifically 5 U.S.C. 702, 703), the Declaratory Judgment Act, as amended (28 U.S.C. 2201, 2202), and the All Writs Act, as amended (28 U.S.C. 1651). Reliance upon the foregoing statutes in the instant action is misplaced.

We first consider the Administrative Procedure Act, as amended (APA).

At the outset, it should be mentioned that in a very recent decision, *Michelin Tire Corporation* v. *United States*, 82 Cust. Ct. —, C.R.D. 79–6 (1979), Judge Watson held that an action contesting an assessment of countervailing duties was not before this court by virtue of the operation of the APA, or pursuant to general principles of judicial review of administrative actions, but rather as a result of the commencement of an independent civil action provided by Congress. In light of Judge Watson's holding and his scholarly and exhaustive opinion, it would be logical to conclude that the APA is inapplicable to an action in this court under the Antidumping Act. However, it is unnecessary to decide this precise issue in the instant case. Even assuming arguendo that the APA applies to actions in this court, the Supreme Court held that "the APA does not afford an implied grant of subject-matter jurisdiction permitting Federal judicial review of agency action". *Califano* v. *Sanders*, 430 U.S. 99, 107 (1977). See also the District Court's opinion in *Penney*, *supra*, 319 F. Supp. at 1030.

Furthermore, plaintiff is not correct in its assertion that "Public Law 94–574 removed any impediment which may have previously impaired the power of this Court to grant the relief requested by plaintiff" (brief at 21). The purpose of the amendatory provision, insofar as pertinent here, was to amend 5 U.S.C. 702 "so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review";

and 5 U.S.C. 703, "to permit the plaintiff to name the United States, the agency or the appropriate officer as defendant * * * [to] eliminate technical problems arising from plaintiff's failure to name the proper Government officer as defendant". H.R. Report No. 94–1656, 94th Cong., 2d sess. 1 (1976). The House Report states, so far as pertinent (at pp. 9–10):[4]

> Other methods found in the substantial and growing body of law governing availability, timing, and scope of judicial review provide a much more rational basis for controlling unnecessary judicial interference in administrative decisions than does the defense of sovereign immunity. Thus, a case is unreviewable if it involves actions "committed to agency discretion by law." Other defenses include (1) statutory preclusion; (2) lack of ripeness; (3) failure to exhaust administrative remedies; and (4) lack of standing. The availability of these defenses—all of which provide a sounder substantive basis to control court review on the merits than the confusing doctrine of sovereign immunity—indicates that the policy against indiscriminate judicial interference with Government action would not be abandoned by eliminating the defense of sovereign immunity.

The House Report further states (at p. 12):

> Law Other Than Sovereign Immunity Unchanged
>
> S. 800 is not intended to affect or change defenses other than sovereign immunity. All other than the law of sovereign immunity remain unchanged. This intent is made clear by clause (1) of the third new sentence added to section 702:
>
> > Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.
>
> These grounds include, but are not limited to, the following: (1) Extraordinary relief should not be granted because of the hardship to the defendant or to the public ("balancing the equities") or because the plaintiff has an adequate remedy at law; (2) action committed to agency discretion; (3) express or implied preclusion of judicial review; (4) standing; (5) ripeness; (6) failure to exhaust administrative remedies; and (7) an exclusive alternative remedy.

Hence, I find that the APA, as amended, does not affect or change defenses other than sovereign immunity where the court otherwise has jurisdiction; nor does the APA confer an additional grant of subject matter jurisdiction upon the Federal courts. And as stated in *Michelin*, *supra*, "[j]urisdiction in this court must be premised on its own particular and explicit statutory authority" (82 Cust. Ct. at—). Accordingly, 28 U.S.C. 1582, in conjunction with 19 U.S.C. 1514 and 1516,

[4] See S. Rept. No. 94-996, 94th cong., 2d sess. 11 (1976).

must be viewed as the controlling grant of jurisdiction in the Customs Court, and as respects jurisdiction, the APA is irrelevant.

We now turn to plaintiff's claim for relief under the Declaratory Judgment Act (28 U.S.C. 2201, 2202). It is well settled that this Act neither creates subject matter jurisdiction where none otherwise exists, nor does the act expand the scope of existing jurisdiction in the Federal courts. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Schulke* v. *United States*, 544 F. 2d 453 (C.A. 10, 1976); *Workman* v. *Mitchell*, 502 F. 2d 1201 (C.A. 9, 1974); *Penney*, 439 F. 2d at 68; *Jarrett* v. *Resor*, 426 F. 2d 213 (C.A. 9, 1970); *Continental Bank and Trust Company* v. *Martin*, 303 F. 2d 214 (D.C. Cir. 1962). Stated otherwise, the Declaratory Judgment Act creates only a particular kind of remedy available in actions where a court already has jurisdiction to entertain a suit. Moreover, a declaratory judgment is equitable in nature, and has "not been considered within the purview of [the Customs] Court". *Matsushita*, 67 Cust. Ct. at 330. *Accord, Mitsubishi International Corporation* v. *United States*, 81 Cust. Ct. —, C.R.D. 78–9 (1978). *Cf. Flintkote* v. *United States, supra.* Further, "[e]quity power can apply only to matters within a court's jurisdiction and cannot be exercised in disregard of the mandatory requirements of the jurisdictional statute". *Boe*, 64 CCPA at 18, n. 9.

In precisely the same situation affecting the Court of Claims, the Supreme Court held in *United States* v. *King*, 395 U.S. 1, 3 (1969), that the Declaratory Judgement Act does not apply to the Court of Claims, since "[t]his [remedy] is essentially equitable relies of a kind that the court of claims has held throughout its history, up to the time this present case was decided, that it does not have the power to grant". To paraphrase the Supreme Court in *King* "[t]his remedy is essentially equitable relies of a kind that the U.S. Customs Court has held throughout its history, up to the time this present case was decided, that it does not have the power to grant"; and accordingly, in the absence of an expressed grant of jurisdiction from Congress, I decline to assume that the Customs Court has been given the authority to issue a declaratory judgement.

Similarly, the All Writs Act, 28 U.S.C. 1651, also relied upon by plaintiff, does not give this court jurisdiction to grant plaintiff the requested relief, but may only be utilized in aid of existing jurisdiction, that is to say, where the jurisdictional prerequisites of 28 U.S.C. 1582 are present. Hence, this court has consistently declined to assume jurisdiction by virtue of the All Writs Act. See the *Dexter* and *Matsushita* cases, *supra. Cf. Flintkote* v. *United States, supra; Penney*, 439 F. 2d at 68.

Finally, I have considered the recent decision in *Association of National Advertisers, Inc.* v. *Federal Trade Commission*, 460 F. Supp.

996 (D.D.C. 1978), cited by plaintiff, in which a declaratory judgment and injunction were issued by the District Court disqualifying the Chairman of the Commission from further participation in a trade regulation rulemaking proceeding on the ground of prejudice in order to prevent irrevocable tainting of all subsequent proceedings.

But the factual situation in the above-cited case is completely different from that in the present case. More to the point, however, the unique jurisdictional scheme applicable to the Customs Court precludes the judicial intervention and type of relief the District Court was able to afford plaintiffs in *National Advertisers*.

In sum, it is readily apparent that in the present case plaintiff, understandably, seeks to circumvent the statutorily prescribed prerequisites for contesting the Secretary's determination. Plaintiff's contention that it is contesting the Secretary's determination to initiate an investigation in its capacity as an American wholesaler under provisions of 19 U.S.C. 1516 is repugnant to the statute. Since plaintiff is suing as an importer, the Secretary's determination is not ripe for judicial review under 28 U.S.C. 1582(c) until plaintiff's entries of methanol have been liquidated with assessment of antidumping duties, protests have been filed and denied, and all liquidated duties, charges and exactions have been paid. Thus, under constraint of the facts and circumstances in this case, the court lacks subject matter jurisdiction at this juncture.[5] Therefore, we do not reach the merits of plaintiff's claim.

IX

I am painfully frustrated and disturbed by certain inabilities of this Article III Court to deal with fundamental questions of fairness affecting American manufacturers, importers and our trading partners, who are concerned with millions of transactions, billions of dollars and significant importance of the domestic and foreign interests affected. Plainly, instances arise where a vacuum may develop with potential harsh consequences—but not alluding to the present case, where I perceive no unfairness to plaintiff resulting from the jurisdictional limitations under which this court must function. I refer,

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[5] Although the issue was not raised in this case, I have noted that it was held by Judge Weinfeld and the Court of Appeals in *Penney* that assumption of jurisdiction by the District Court would contravene the Anti-Injunction Act, 26 U.S.C. 7421, which prohibits a suit "for the purpose of restraining the assessment or collection of any tax". Section 7421 was also mentioned by Judge Foley in *Flintkote, supra*. While cited in connection with the Declaratory Judgment Act and the All Writs Act, plaintiff has called attention in a footnote to the Supreme Court's decision in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 584 (1976). In *Federal Energy*, the Supreme Court held that license fees assessed under the authority conferred on the President by the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, rather than the Internal Revenue Code, are not "taxes" within the scope of the Anti-Injunction Act. Thus, there is a question as to whether antidumping duties are "taxes" within the purview of the Anti-Injunction Act. In any event, inasmuch as defendants to not rely on section 7421, the applicability of that provision in the instant case need not be decided.

of course, to the lack of equity jurisdiction in our court[6]—quite apart from this court's need in appropriate cases to exercise such judicial authority and power. See the report of the proceedings of the *Third Annual Judicial Conference of the United States Court of Customs and Patent Appeals, May 10, 1976*, 72 F.R.D. 239, 372–378, 381–396, which strikingly illustrates the Customs Court's vital need in appropriate instances, to be statutorily clothed with equity jurisdiction. Distilling from *Dexter, supra*, 78 Cust. Ct. at 181:

> * * * It would appear that if the relevant jurisdictional statute satisfies the rudimentary constitutional requirements plaintiff's real argument is with the terms of the legislation and the final resolution of such a problem is a matter within the special competence of Congress. Congress is the proper body to consider whether the existing limitations on the jurisdiction of the court are possibly permitting the existence of inequities, which although they may not be unconstitutional, are nevertheless incompatible with our sense of fairness and the spirit of an impartial and equitable government of laws.

And compare the very recent and significant statement by Circuit Judge Friendly, writing for the unanimous Second Circuit in affirming the District Court's decision in *Flintkote:*

> * * * This case is *a fortiori* since the "more desirable remedies" sought by Flintkote are remedies which Congress advertently withheld. If American manufacturers are to have the added remedies desired by Flintkote, it must be Congress that gives them. [— F. 2d at —].[7]

I wish to extend my sincere appreciation to counsel for their excellent memoranda, which greatly aided in the expeditious disposition of this case—as requested by counsel.

For the reasons stated herein, an order was entered on March 15, 1979, granting defendants' cross-motion to dismiss for lack of jurisdiction of the subject matter, but without prejudice to renewal by plaintiff if and when the jurisdictional prerequisites can be satisfied, and denying plaintiff's motion for summary judgment.

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[6] In *Flintkote Company* v. *W. Michael Blumenthal, Secretary of the Treasury, supra*, Judge Foley stated that "I find plaintiff's assertion that the Customs Court, which is now an article III court, is without any equitable jurisdiction hard to accept. * * * Yet, it is true that the Customs Court cannot act upon Flintkote's requested relief until jurisdiction in that court is perfected. See *Dexter* v. *United States*, 424 F. Supp. 1069 (Cust. Ct. 1977)".

[7] Interestingly and parenthetically, Judge Friendly also observed in *Flintkote:*

> Mr. Justice Frankfurter once said "I do not use the term 'jurisdiction' because it is a verbal coat of too many colors." *United States* v. *L. A. Tucker Lines*, 344 U.S. 33, 39 (1952) (dissenting opinion). See also *Yonkers* v. *United States*, 320 U.S. 685, 695 (1944) (dissenting opinion), " 'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls." [— F. 2d at —, n. 6].

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *March 26, 1979.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/52	Watson, J. March 21, 1979	B.P.M. International Ltd.	76-3-00627	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Combination article which contains a tape player as an important element
P79/53	Watson, J. March 21, 1979	Kalmar Trading Co.	76-10-02357	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	San Francisco Backpacking tents

P79/54	Ford, J. March 22, 1979	Lingl Corporation et al.	76-4-01031, etc.	Item 531.37 22.5% (items marked "A" and "B")	Item 532.11 Free of duty (items marked "A") Item 531.27 Free of duty (items marked "B")	Agreed statement of facts	Norfolk Firebricks, type A111X (items marked "A") and type A0X (items marked "B")
P79/55	Watson, J. March 22, 1979	Naftone, Inc.	72-6-01280	Item 405.25 12.5% + 1.9¢ per lb.; 10.5% + 1.6¢ per lb.	Item 494.60 3%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400, etc. (hydroxylated polyurethane products)
P79/56	Newman, J. March 22, 1979	Wacker Chemical Corp.	77-3-00525, etc.	Item 658.00 9%	Item 632.43 5%	Wacker Chemical Corporation v. U.S. (C.D. 4695)	New York Rods (hyper-pure silicon)

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/29	Ford, J. March 21, 1979	Control Data Corporation	R67/6843, etc.	Constructed value	Per unit values set forth in schedule 2 attached to decision and judgment, which values include amounts eligible for allowance under item 807.00	Control Data Corporation v. U.S. (C.A.D. 1132)	Minneapolis Inner memory plane assemblies and outer memory plane assemblies
R79/30	Richardson, J. March 21, 1979	National Silver Co.	R62/14724	Export value (items described on schedules A and B attached to decision and judgment)	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values (schedule A items) Various appraised unit values less 7.5%, net packed (schedule B items)	Agreed statement of facts	San Diego Porcelainware sets, etc. (schedule A items); earthenware sets (schedule B items)

R79/31	Richardson, J. March 22, 1979	National Silver Co.	R62/11421, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Flatware
R79/32	Watson, J. March 22, 1979	Sandoz, Inc.	74-2-00390	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7%, 28.9% and 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

Appeal to U.S. Court of Customs and Patent Appeals

APPEAL 79–18.—Schott Optical Glass, Inc. *v.* United States.—COLOR FILTER GLASS—OPTICAL GLASS—COLORED OR SPECIAL GLASS—TSUS. Appeal from C.D. 4783.

In this case the Customs Court held that color filter glass was properly classified by the customs officials as optical glass pursuant to item 540.67, Tariff Schedules of the United States, as modified by T.D. 68–9, with duty at the rate of 40 percent ad valorem. Plaintiff-appellant claimed that the merchandise should have been classified as colored or special glass, not ground, polished or processed, under item 542.92, as modified by T.D. 68–9, with duty at the rate of 0.7 cent per pound plus 2.5 percent ad valorem.

It is claimed that the Customs Court erred in finding and holding that the imported color filter glass is properly classifiable under item 540.67, supra, and assessed with a rate of duty of 40 percent ad valorem; in not finding and holding that the imported merchandise was properly classifiable under item 542.92, supra, with duty assessable at a rate of 0.7 cent per pound plus 2.5 percent ad valorem; in finding and holding that the imported merchandise is optical glass; in not finding and holding that the imported merchandise is flat glass; in not finding and holding that the imported merchandise is "colored or special glass" as that term is statutorily defined in headnote 2(c), subpart B, part 3, schedule 5, TSUS; in not finding and holding that optical glass must meet exact specifications for refractive index and dispersion; in finding and holding that the imported filter glass possesses a refractive index and dispersion within the tolerances required for optical glass; in not finding and holding that refractive index for optical glass is a property which must be known on every piece of glass, with variations or deviations not greater than one in the fourth decimal place; in finding and holding that the absorption property of glass alone is sufficient to render glass optical glass irrespective of its refractive and dispersive properties; in finding and holding that any glass which is of very high quality; used for optical instruments; and capable of performing an optical function is optical glass within the statutory meaning of that term; in not finding and holding that the imported colored filter glass is not made into lenses and prisms; and in holding, deciding, and rendering judgment contrary to law and without any substantial evidence to support the decision.

ERRATUM

CUSTOMS BULLETIN, Vol. 13, No. 12, March 21, 1979, page 53, under C.R.D. 79–5, Memorandum Decision and Order the first line should read as follows:

RICHARDSON, Judge: Plaintiff, an American manufacturer of Portland hydraulic cement,

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs Officers and others concerned.

R. E. CHASEN,
Commissioner of Customs.

In the Matter of CERTAIN AUTOMATIC CRANKPIN GRINDERS	Investigation No. 337–TA–60

Notice of Investigation

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 15, 1978 (and amended on November 29, 1978, and December 1, 1978), under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), on behalf of the Landis Tool Co., Waynesboro, Pa. 17268, alleging that unfair methods of competition and unfair acts exist in the importation of certain automatic crankpin grinders into the United States, or in their sale, by reason of the alleged coverage of such automatic crankpin grinders by claims 5, 8, 9, 11, 16, 19, and 24 of U.S. Letters Patent 3,118,258, owned by Litton Industrial Products, Inc. The amended complaint alleges that the effect or tendency of such unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Complainant requests that the articles in question be permanently excluded from entering the United States, and such additional temporary and permanent relief as the Commission authorizes.

Having considered the amended complaint, the U.S. International Trade Commission, on December 12, 1978, ORDERED THAT—

1. Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine under subsection (c) whether, on the basis of the allegations set forth in the amended complaint and the evidence adduced, there is a violation of subsection (a) of this section in the unauthorized importation of certain automatic crankpin grinders into the United States, or in their sale, by reason of the alleged coverage of such automatic crankpin grinders by claims 5, 8, 9, 11, 16, 19, and 24 of U.S. Letters Patent 3,118,258, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

2. For the purpose of this investigation so instituted, the following are hereby named as parties:

a. The complainant: Landis Tool Co.
Division of Litton Industrial Products, Inc.
Waynesboro, Pa. 17268

b. The respondents are the following companies alleged to be involved in the unauthorized importation of such articles into the United States or in their sale, and are parties upon which the complaint and this notice are to be served:

i. Newall Machine Tool Co., Ltd.
Oundle Road
Peterborough, England

ii. The Ford Motor Co.
The American Road
Dearborn, Mich. 48121

c. Robert M. M. Seto, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, is hereby named Commission investigative attorney and a party to this investigation.

3. For the purpose of the investigation so instituted, Chief Administrative Law Judge Donald K. Duvall shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the U.S. International Trade Commission's Rules of Practice and Procedure, as amended (19 CFR 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the Rules, such responses will be considered by the U.S. International Trade Commission if received no later than 20 days after the date of service of the amended complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations, and will authorize the presiding officer and the U.S. International Trade Commission, without further notice to the respondents, to

find the facts to be as alleged in the amended complaint and in this notice and to enter both a recommended determination and a final determination containing such findings.

The amended complaint is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and in the New York City office of the Commission, 6 World Trade Center.

By order of the Commission.

Issued: December 12, 1978.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN PUMP TOP INSULATED CONTAINERS } Investigation No. 337–TA–59

Notice of Amendment to the Supplemented Complaint and Notice of Investigation

Upon consideration of Motion Docket No. 59–1, as certified to the Commission by the administrative law judge (ALJ) on January 24, 1979, together with the supporting documents filed by the complainant and the Commission investigative attorney, and the ALJ's recommendation of January 24, 1979, that the supplemented complaint and notice of investigation be amended, the Commission is ordering:

(1) The deletion of W. P. Hemenway Co. as a respondent in the supplemented complaint and the notice of investigation which was filed in the Federal Register on November 9, 1978 (43 F.R. 52297);
(2) The deletion of the New York Merchandise Co. as a respondent in the supplemented complaint; and
(3) The addition of the following new respondents to the supplemented complaint and the notice of investigation:

The Warren Co.
3104 West Lake Street
Minneapolis, Minnesota 55416
The Rollin Corp.
P.O. Box 3774
Taipei, Taiwan
Apollo Limited
459–22 Karibong-Dong
Seoul, Korea

The Commission is also ordering that complainant's motion for removal of the request for a temporary exclusion order from the supplemented complaint is denied.

Copies of the "Commission Action, Order, and Opinion" are available to the public during official working hours at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone, 202–523–0161.

By order of the Commission.

Issued: March 30, 1979.

KENNETH R. MASON,
Secretary.

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